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AMERICAN ELECTRICAL CASES

(CITED AM ELECTL. CAS.)

BEING

A COLLECTION OF ALL THE IMPORTANT CASES (EXCEPT-
ING PATENT CASES) DECIDED IN THE STATE AND
FEDERAL COURTS OF THE UNITED STATES
FROM 1873 ON SUBJECTS RELATING TO

THE TELEGRAPH, THE TELEPHONE, ELECTRIC
LIGHT AND POWER, ELECTRIC RAILWAY,
AND ALL OTHER PRACTICAL USES
OF ELECTRICITY

WITH ANNOTATIONS

EDITED BY

WILLIAM W. MORRILL,
Author of "Competency and Privilege of Witnesses," "City Negligence," etc.

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PREFACE.

There would seem to be scarcely any excuse for writing a preface to this volume, unless it be to invite attention to the rapid increase of adjudications within the scope of the series, and the broadening of its field due to increasing uses of electricity.

This may be fairly illustrated by some comparison of the present with the last preceding volume, since they cover recent and not far from equal periods.

Of the 130 cases in Vol. 2, 69 are "telegraph cases," that is, those pertaining to the duties and liabilities of telegraph companies as public carriers of news; while of the 110 cases in this volume, but 42 are of that class. This is not on account of the decrease of such litigation, which in some localities seems rather to constantly increase, but because it has been found necessary to abridge many of those cases and place them in notes.

The subject of interference of electrical currents, usually made prominent in actions brought by telephone companies whose weaker currents and delicate apparatus are unfavorably affected by the powerful currents required by light and power companies, is represented by two cases in Vol. 2, and by ten cases in this volume.

The rights of abutting owners, as affected by the maintenance in highways of apparatus required by users of electricity, were considered in six cases in Vol. 2; while in this volume there are eighteen upon that subject. This is doubtless due largely to the fact that so long as only telegraph lines existed, employing few poles and wires, and in no other way using the highways, owners of adjacent land did not feel the burden; but the multiplication of wires and posts, and particularly the use of streets by electric railways, have aroused the land owners to the necessity of testing their rights.

Leaving out of consideration "telegraph cases," as above defined, telegraph companies were concerned in sixteen cases in this volume, electric light companies in eighteen, telephone companies in twenty, and electric railway companies in twenty-five, or nearly one-fourth of the whole number in the volume; a surprising proportion, considering how recent was the general use of the electric railway at the time when these cases arose.

The last two opinions reported in this volume relate to an application of electricity, which, while not commercial, is intensely practical, to wit, the infliction by that agency of the death penalty for capital offences, now required by statute in the State of New York. The constitutionality of the law was zealously attacked, and it is thought the decisions of that question by the Court of Appeals of New York and the United States Supreme Court may be appropriate here.

A word of explanation as to the plan of reporting may be proper. It is the aim to print every opinion (or the portion of it appropriate to this series), exactly as it was delivered, citations and all, without addition or excision. Therefore, if in the official report (or, if such has not been found, in the volume from which the case is copied, which is always named at the head) a case is cited from one set of unofficial reports, or journal, and no reference made to others in which it may also have been printed, it should be understood that the selection is that of the writer of the opinion (or possibly of the reporter) and not of the editor of this series. So far is this plan of literal copying followed that where the case cited is to be found in this series, that fact is indicated merely by printing its title in full-face type, the reference being inserted at the end of the head-note.

Thanks are returned for continued assistance from gentlemen whose names have already been mentioned, as well as valuable suggestions and help from others; all tending to show active and increasing interest in the success of the enterprise.

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AMERICAN ELECTRICAL CASES.

WESTERN UNION TELEGRAPH COMPANY v. ALABAMA STATE BOARD OF ASSESSMENT.

United States Supreme Court, December 16, 1889.

(183 U. S. 472, reversing 1 Am. Elec. Cas. 844.)

TAXATION OF TELEGRAPH RECEIPTS.—INTERSTATE COMMERCE.—POST-ROADS ACT.

Telegraph companies which have accepted the provisions of the post-roads act of Congress (U. S. R. S. §§ 5243-8) are not liable to taxation by State authorities upon receipts arising from interstate telegrams; but only upon those arising from messages carried and delivered exclusively within the State.

Cases of this series cited in opinion: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *Telegraph Co. v. Texas*, vol. 1, p. 378; *W. U. Tel. Co. v. Massachusetts*, vol. 2, p. 57; *Ratterman v. W. U. Tel. Co.*, vol. 2, p. 68; *Leloup v. Port of Mobile*, vol. 2, p. 79; *W. U. Tel. Co. v. Richmond*, vol. 1, p. 149; *W. U. Tel. Co. v. Mayer*, vol. 1, p. 214.

ERROR to the Supreme Court of the State of Alabama.

The facts which raised the Federal question are stated in the opinion.

Gaylord B. Clark and Thomas G. Jones, for plaintiff in error.

John T. Morgan, for defendants in error.

Telegraph Co. v. Board of Assessment.

Mr. Justice MILLER delivered the opinion of the court. This case comes before us on a writ of error to the Supreme Court of the State of Alabama.

The question on which the jurisdiction of this court depends has been decided in this court so frequently of late years, several of the decisions having been made since the judgment of the Supreme Court of Alabama was delivered, that but little remains to be said in the present case except to show that it comes within the principle of the cases referred to.

That principle is, in regard to telegraph companies which have accepted the provisions of the act of Congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a State for any messages, or receipts arising from messages, from points within the State to points without or from points without the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States and not subject to legislative control of the States, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State, and therefore subject to its taxing power. The following cases in this court have fully developed and established this proposition: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Port of Mobile*, 127 U. S. 640; *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326.

The plaintiff in error instituted its proceedings in the State court by a writ of *certiorari*, directed to E. A. O'Neal, governor; C. C. Langdon, secretary of State; M. C. Burke, auditor; and Frederick H. Smith, treasurer, composing the State board of assessment, for the purpose

of correcting the error which they had made in an assessment for taxation of the gross receipts of the company. This board was invested by the law of Alabama with authority to assess for taxation the items of property of railroad companies returned to the auditor of the State (section 13 of the act approved February 17, 1885, Laws of 1884-5, p. 1), and by section 15 of the same act a similar authority is conferred upon it in reference to telegraph companies whose lines, or any part thereof, are within the State. By an act to levy taxes for the use of the State, and the counties thereof, approved December 12, 1884, it is declared by subdivision 6, section 1, that a tax shall be levied

On the gross amount of the receipts by any and every telegraph, telephone, electric light and express company, derived from the business done by it in this State, at the rate of two dollars on the hundred dollars.

The telegraph company, in making its report of gross receipts to this board of assessment, included only those received from business transacted wholly within the State of Alabama. The board were not willing to accept this report, and required the company to make report of its receipts from all messages, whether carried wholly within or partly without the State, and, against the remonstrances of the company, decided that this sum should be the amount on which the tax of two per cent. should be paid. It was to correct the supposed error of this assessment that the writ of *certiorari* was issued by the Circuit Court of Montgomery county to the governor and others constituting that board of assessment. That court held the assessment valid, and made an order quashing the writ of *certiorari* and dismissing the proceeding. On appeal to the Supreme Court of the State this decision was affirmed (80 Alabama, 273), and the case is now before us, on a writ of error, to review that judgment of affirmance. In the opinion of the Supreme Court of Alabama, which is found in the record, the point mainly discussed is the construction of the tax law, in regard to the meaning of the words

"gross receipts derived from business done in this State," and also whether, "if that means all the receipts of the company for business having connection with lines within the State, it is consistent with the Constitution of Alabama." Of these questions the court has no jurisdiction; but, having decided that the statute, by fair interpretation, included all receipts derived from business done in the State, and actually received there, though the message may have been delivered at, or may have been sent for delivery from, some office out of the jurisdiction of the State, the court proceeds: "Though thus construed, the statute is not an unauthorized interference with interstate commerce. This question is fully and ably considered and discussed in the following cases: *Western Union Tel. Co. v. Richmond*, 28 Grattan, 1; *Western Union Tel. Co. v. State*, 55 Texas, 314; *Western Union Tel. Co. v. Mayer*, 28 Ohio, 521; *Port of Mobile v. Leloup*, 76 Alabama, 401; and is expressly decided in respect to a tax on the gross receipts of railroad companies, they consisting in part of freights received for transportation of merchandise from the State to another State, or into the State from another, in *State Tax, on Railway Gross Receipts*, 15 Wall. 284; and in *Osborne v. Mobile*, 16 Wall. 479." (80 Alabama, 281.)

It will be observed that the authorities relied on by the Supreme Court of Alabama to sustain its judgment in this case are mostly decisions of State courts. The case of *The Western Union Tel. Co. v. State*, 55 Texas, 314, and the case of *Port of Mobile v. Leloup*, 76 Alabama, 401, have been reversed by the decisions of this court in the same cases on writ of error to the State courts. Of the cases already referred to as establishing the proposition which we have stated in the early part of this opinion, those of *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, and *Leloup v. Port of Mobile*, 127 U. S. 640, are all cases in regard to taxes upon telegraph companies by State authori-

ties, and all of them hold that no tax can be imposed upon messages, or upon the receipts derived from messages, where the communication is carried either into the State from without, or from within the State to another State.

In the earliest of these cases, *Pensacola Tel. Co. v. Western Union Tel. Co.*, the statute of Florida had attempted to confer upon a corporation of its own State, the Pensacola Telegraph Company, an exclusive right of doing the telegraph business within that State. This court held, affirming the judgment of the Circuit Court of the United States for that district, that this statute was a regulation of commerce among the States forbidden by the Constitution of the United States to the State of Florida. In the next case, that of the *Telegraph Co. v. Texas*, in which that State had imposed a tax of one cent for every full-rate message sent and one-half cent for every message less than full rate, on the business of the Western Union Telegraph Company, many of the messages were by the officers of the government on public business, and a large portion of them were to places outside the State. The company contested the constitutionality of this law, and the case came to this court, where it is said a telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad does as a carrier of goods. Both companies are carriers, and their business is commerce itself. The court then went on to consider the authorities, and said further that it followed that the judgment under review, so far as it included the messages sent out of the State or for the government on public business, was erroneous. The rule that the regulation of commerce, which is confined exclusively within the jurisdiction and territory of the State, and does not effect other nations or States, that is to say, the purely internal commerce of this State belongs exclusively to the State, was said to be as well settled as that the regulation of commerce, which does not affect other nations or States or Indian tribes, belongs to Congress. The judgment of the Supreme Court of Texas was, therefore, reversed.

The case of *Western Union Tel. Co., v. Massachusetts* was a question growing out of the taxation of the telegraph company by the State of Massachusetts, and the same principle we have already considered was asserted in that case, after a general review of the authorities upon the subject.

In *Ratterman v. Western Union Tel. Co.* the same question arose on a writ of error to the Circuit Court of the United States for the Southern District of Ohio, where, after a full review of the whole subject, this court said that there was really no question, under the decisions of this court, in regard to the proposition that so far as a tax was levied upon receipts properly appurtenant to interstate commerce it was void ; and that so far as it was only upon commerce wholly within the State it was valid. The commerce here mentioned was telegraph business, and the receipts were receipts for telegraph messages. This case arose upon a certificate of division of the judges who presided at the trial, and in remanding the case the court said: "We answer the question in regard to which the judges of the Circuit Court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross, and without separation or apportionment, is not wholly valid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce ;" and, concurring with the circuit judge in his action, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, the decree was affirmed.

In the subsequent case, *Leloup v. Port of Mobile*, found in the same volume, the question arose upon a conviction under the statute of Alabama on an indictment for failing to take out a license tax by the telegraph company,

imposed by the city of Mobile on all telegraph companies. Edward Leloup, the agent of the company, was convicted under the proceeding, his conviction affirmed by the Supreme Court of Alabama, and its judgment brought to this court on writ of error. This court held that, his company having complied with the act of Congress of July 24, 1866, the State could not require it to take out a license for the transaction of business in the city, and that a general license tax on the telegraph company affected its entire business, interstate as well as domestic and internal, and was unconstitutional.

We think these cases are so directly in point on the question arising in the present case that they must control, and as the record of the case presents the means by which the receipts arising from commerce wholly within the State, and from that which, under these definitions, may be called interstate commerce, can be separated, the judgment of the Supreme Court of Alabama is *reversed*, and the case is remanded to it, with directions for further proceedings in conformity with this opinion.

NOTE.—The above adds another to the line of cases already reported in this series, in which the Supreme Court of the United States has decided that State statutes were void, as being in violation of the provision of the Constitution which gives to Congress the power to regulate commerce among the States. The question has arisen in various ways, and upon statutes of several States.

In *Pensacola Tel. Co. v. W. U. Tel. Co.* (1 Am. Elec. Cas. 250), the State of Florida undertook by statute to confer upon a single telegraph company the exclusive right to operate over a certain portion of its territory. It was held unnecessary to decide whether or not the State could have taken such action, if Congress had not acted in the premises, for it had so acted, and the "post-roads act" of Congress of July 24, 1866, was held to amount "to a prohibition of all State monopolies in this particular." It was held that the regulation of commerce includes the regulation of commercial intercourse and facilitating the transmission of intelligence; and that the powers given to Congress by the Constitution are not confined to instrumentalities then known, but to those subsequently invented or adopted, including the telegraph. Also, that "a law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict."

Telegraph Co. v. Board of Assessment.

In *W. U. Tel. Co. v. Texas* (1 Am. Elec. Cas. 373), a statute of the State of Texas was under consideration, which required of every telegraph company doing business within the State a fixed tax for every message sent. The Supreme Court of Texas (55 Tex. 314) sustained the imposition of this tax. The United States Supreme Court held that the statute was void as to messages to be sent without the State and those sent by government officers upon public business; the former because in that respect it was a regulation of interstate commerce, which properly belonged to Congress, and the latter because it was State taxation of the means employed by the United States Government to execute its constitutional powers. It was also held that any tax imposed upon messages of private parties, sent from one place to another exclusively within the State, would not be repugnant to the United States Constitution.

The next case, *W. U. Tel. Co. v. Pendleton*, arose in Indiana, over the statute of that State imposing a penalty for error, delay, &c., in the transmission of telegrams. The message in question was to be transmitted without the State, and the validity of the statute so far as its application to interstate telegrams was concerned, was contested. The State Supreme Court (1 Am. Elec. Cas. 632), while recognizing the binding force of the two preceding cases, in cases where they applied, decided that they did not apply to the statute in question, which was a proper exercise of the police power of the State, and was constitutional and general in its application. This was reversed (3 Am. Elec. Cas. 50), the United States Supreme Court deciding that the case was governed by *Tel. Co. v. Texas*. It pointed out that the police power of a State is subject to the limitation that it must not encroach upon the free exercise by Congress of the power vested in it by the Constitution.

In *W. U. Tel. Co. v. Commonwealth* (1 Am. Elec. Cas. 756), the Supreme Court of Pennsylvania held that a State tax upon the gross receipts of a telegraph company, including those for interstate messages, was valid. This was reversed, with very brief opinion, by the United States Supreme Court (3 Am. Elec. Cas. 88).

The next was the Alabama case (1 Am. Elec. Cas. 844), which was reversed by the decision reported above.

In *Leloup v. Port of Mobile* (2 Am. Elec. Cas. 79) there were in question the charter of the Port of Mobile, and a municipal ordinance thereunder imposing an occupation tax upon a telegraph company. The Alabama Supreme Court sustained the ordinance, and its decision was reversed by the United States Supreme Court (3 Am. Elec. Cas. 79), upon a full discussion of the subject.

In *W. U. Tel. Co. v. Attorney-General of Massachusetts* (2 Am. Elec. Cas. 57), the decision of the United States Supreme Court was adverse to the telegraph company, which claimed that by virtue of its acceptance of the provisions of the post-roads act it became entitled to exemption from State taxation upon so much of its property as lay upon and along post-roads.

Matter of Taxation of Telephone Co.

In *Ratterman v. W. U. Tel. Co.* (2 Am. Elec. Cas. 68) the only question which came before the United States Supreme Court was whether a single tax, assessed under a State statute, upon receipts of a telegraph company derived partly from interstate commerce and partly not, but assessed in gross, was wholly void, or void only as to the interstate business. The decision was that it was void only as to the latter.

In the two cases next following this, State courts have for the first time recognized the application of the commerce provision of the United States Constitution to telegraph companies.

See note, vol. 2, p. 89.

IN THE MATTER OF THE TAXATION OF THE PENNSYLVANIA
TELEPHONE COMPANY.

Court of Chancery of New Jersey, February, 1891.

(48 N. J. Eq. 91.)

TAXATION OF TELEPHONE COMPANY.—INTERSTATE COMMERCE.—INJUNCTION.

A telephone company having lines extending into more than one State is an instrument of interstate commerce, and its business cannot be restrained by injunction by a State court, for failure to pay taxes imposed by such State.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Mass.*, vol. 2, p. 257; *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *Tel. Co. v. Texas*, vol. 1, p. 378.

ON petition for injunction.

The Attorney-General, for the State.

Wm. S. Gummere, for the respondent.

BIRD, V. C.: The respondent, in its answer to the petition in this case, admits its liability to be assessed under the act of April 18th, 1894 (Rep. Sup. p. 1016), but denies its liability for the whole amount of assessment imposed by the State board of assessors. The law provides

That every telegraph, telephone, cable or electric light company, not owned by a railroad company and otherwise taxed, doing business in this State, should pay an annual tax for the use of the State, by way of a license for its corporate franchises.

The law requires every such company, on or before the first Tuesday of May, to state the gross amount of its receipts from the business done in this State for the year preceding the first day of January prior to the making of such report. If any such company shall neglect or refuse to make such return within the time limited as aforesaid, the State or its assessors shall ascertain and fix the amount of such receipts in such manner as may be deemed to them most practicable, and the amount fixed by them shall stand as the basis of taxation of such company under said act. By virtue of said act each of said companies is made liable to pay taxes of two per cent. upon the amount of its gross receipts so returned or ascertained. On or before the first Tuesday of May, 1888, the respondent did make a report showing the amount of its gross receipts for the business done in this State for the year ending December 31st, 1887. By such report such receipts appear to be \$3,643.47. It also reported, at the request of the State board of assessors, its gross receipts for business originating within this State and terminating without, \$3,122.53, and also the gross amount of receipts from business originating in Pennsylvania and terminating within this State, which amount was \$7,398.03.

On the 25th day of June, 1888, the respondent paid the State \$72.87, the amount properly assessed upon its gross receipts of the business done within this State, but the whole amount assessed by the State board of assessors was \$135.32. This shows that the assessors were not contented with the gross receipts returned by the respondent of business done within this State, but proceeded, as they supposed they might, under the act to ascertain what, in their judgment, was the proper amount of gross receipts, to be assessed, from other sources, and assessed \$3,122.53, in addition to \$3,643.47. This additional assessment the respondent insists is unlawful.

Its resistance to the payment of this additional tax is based upon the doctrine that it is unconstitutional for any State to attempt to regulate commerce between the States;

and that business of this character, originating in one State and terminating in another, is such commerce. I believe this principle was so recognized in the case of the *Standard Underground Cable Co. v. Attorney-General*, 1 Dick. Ch. Rep. 270. In that case Mr. Justice KNAPP said, in delivering the opinion of the Court of Errors and Appeals: "Railroads and telegraphs may become instruments of interstate or international commerce, and when, as such instruments, they are in action, they may not be obstructed by State impositions and restrictions; hence, it was held in *The Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, that the telegraph company having brought itself within the provisions of the act of Congress of July 24th, 1886, entitled 'An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes,' that collection of a tax imposed upon the telegraph company on its property in Massachusetts could not be enforced by injunction, although the taxing act provided for that as one mode of enforcing payment; the reason being that an injunction enforced in that State would put a stop to its general operations. The tax, however, was held to be valid, and the State was left to other remedies for its collection. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460, are also instances of illegal interference with companies and instruments of commerce. But each of these cases holds the companies to be subject to taxation, otherwise legal, which does not obstruct or place a direct burthen upon them either as instruments of general commerce or as agents of the United States.

"The case of *Coe v. Errol*, 116 U. S. 517, marks the point where the subjects of commerce pass out of the State's power to tax and come within Federal protection. That point is not reached when they become finished production. It is there held that goods, the product of a State, intended for exportation to another State, are liable as part of the

general mass of property of the State of another origin until actually started in course of transportation to the State of their destination, or are delivered to a common carrier for that purpose."

These principles are as applicable to messages by telephone as to merchandise. There can be no reasonable distinction made between the office of common carrier by telephone and the office of a common carrier of goods by railway or steamboat. In both cases it is commerce between the States. In every such instance the consideration is, when is the transaction within the constitutional regulation? The disputes which have led to judicial determination of the various questions have been respecting those conditions which upon one hand were deemed commerce and upon the other not.

I think, therefore, the injunction prayed for in this case ought not to be allowed; for if it were to be allowed, it would most certainly, though indirectly, control commerce between States.

But beyond this I do not feel at liberty to consider the question as to the legality or illegality of the assessment. I can only say that a proper case is not made out for the interference of this court. To determine whether this assessment shall stand or be set aside or not, is the province of the courts of law. The power given to this court by the statute extends only to granting injunctions where taxes assessed are not paid. No authority whatever is conferred to review such assessments. Whatever the result may be practically, in every such case as the one now before the court, it seems to me it would be a plain usurpation for this court to attempt to set the assessment aside in this or any other case. That the constitutional question may be considered by the Court of Chancery was expressly decided in the case of *Standard Underground Co. v. Attorney-General*, *supra*. But, as has been shown, the question in that case only pertained to the propriety of issuing an injunction, and no other question has been

Commonwealth v. Smith and Express Co.

considered in this. If the respondent desires a declaration that this assessment, in excess of the \$3,643.47, be set aside, it must seek it in another form.

NOTE.—See note to preceding case.

A similar decision as to telegraph companies was made in *W. U. Tel. Co. v. Atty.-Genl.*, 2 Am. Elec. Cas. 57.

COMMONWEALTH V. CHARLES SMITH.

SAME V. UNITED STATES EXPRESS COMPANY.

Kentucky Court of Appeals, Sept. 24, 1891.

(92 Ky. 38.)

CONSTITUTIONAL LAW.—INTERSTATE COMMERCE.—TAXATION.

Two statutes, one imposing a license tax of \$500 on every express company having less than one hundred miles of lines and \$1,000 on those having over that amount; and the other imposing an annual tax on telegraph companies of one dollar per mile for poles and one wire, and fifty cents for each additional wire, *held* void under the Constitution of the United States, as taxing instruments of interstate commerce.

Cases of this series cited in opinion: *Tel. Co. v. Texas*, vol. 1, p. 373; *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *Leloup v. Port of Mobile*, vol. 2, p. 79.

APPEAL from Louisville Law and Equity Court.

Two actions argued and decided as one. Appeal by plaintiff from judgments in favor of defendants. Facts stated in opinion.

Helm & Bruce, for appellant.

Rozel Weissinger, for appellee, Smith.

Harmon, Colston, Goldsmith & Hoadly, for appellee, Express Company.

PRYOR, J., delivered the opinion of the court: These two cases involve the validity of a tax imposed upon the two appellees, both being foreign corporations, and resisting its payment upon the ground that the statute imposing the burden is in violation of the Federal Constitution.

The exercise of the power is claimed to be derived from two sections of the statute, the one applying to the United States Express Company, and the other to Charles Smith, an agent of the Western Union Telegraph Company. The cases were argued as one by counsel for the State, and will be disposed of in the one opinion.

The section of the statute with reference to express companies provides "That all express companies doing business in this State shall be required to pay a license tax of five hundred dollars per annum, where the distance over which the lines of such companies operate or extend in this State is less than one hundred miles, and the annual sum of one thousand dollars where the distance is more than one hundred miles; and neither the company nor agent of any company which has paid the license tax required to be paid by this section shall be required to pay any other license or tax to any county, city or municipality in this State: *Provided*, such company shall pay *ad valorem* taxes for county and municipal purposes upon all horses, wagons, furniture, real estate and other property, at the same rate of taxation as is collected upon other property in this Commonwealth." (General Statutes, chapter 92, article 4, section 6.)

The appellee, the Express Company, insists that this statute is in violation of that provision of the Federal Constitution giving to Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." (Article 1, section 8, subsection 3, Federal Constitution.)

In this action by the State to recover the license tax, a proceeding authorized by statute, the appellee has filed an answer alleging the payment of all taxes assessed against it by the State, whether State, county or municipal; and

then proceeds 'to deny the right of the State to impose a burden upon it for the privilege of conducting a business that is in aid of or as a carrier of commerce between the several States; that it transmits goods, etc., over its lines for commercial and business purposes, between points within the State of Kentucky, and from points within the State to points in all the other States, its lines affording business relations in the way of transportation between the several States and territories, and between the United States and foreign countries.

The only question presented is, does this statute amount to a regulation of commerce, as settled in cases of a kindred character by the Supreme Court? The case of *Crutcher v. Commonwealth*, 141 U. S. 147, recently decided on an appeal from this court, where a license fee of five dollars was required to be paid by every agent of an express company before engaging in such business, was held to be an exaction in respect of commerce; and the reasons given by this court for sustaining the validity of the act upon the idea that it was passed to protect its citizens against irresponsible corporations, and not to interfere with interstate commerce, was held not to be a sufficient response to the defense, because the effect of the act was to impose conditions as to the manner of conducting interstate commerce that could not be sustained. This is a stronger case for the corporation than that of *Crutcher*.

It is plain that this tax is imposed upon the business, or upon the privilege of transacting business, within the State; and if such a right, when given, can be taxed as contended by counsel for the State, it would be conceding to the State government the right to prohibit any express company in another State from doing business here, by reason of the heavy burdens placed upon it by State legislation. If the regulation of commerce belongs alone to the National Government, and of this there is no question, then it is apparent the State has no power to impose such burdens. Nor is it material that the burden imposed may not likely affect interstate business or commerce. It may not amount

to a prohibition, still, if the attempt or the effect of the legislation is to regulate interstate traffic, the statute is invalid. Such is the decision of the Supreme Court in several cases. *Lyng v. Michigan*, 135 U. S. 161; *Crutcher v. Commonwealth*, 141 U. S. 47. "All express companies doing business in the State shall pay a license tax," and, this being exacted for the right to do business, the act must be held to be invalid.

In the case of *Commonwealth v. Charles Smith*, the appellee questions the validity of the revenue law taxing telegraph companies; Smith being an agent of the Western Union Telegraph Company, and as such liable for the tax imposed, and for the penalty for non-payment. The provision of the revenue law is as follows:

"It shall be the duty of the president, treasurer, secretary, or manager of any telegraph company or association working, operating, or controlling any telegraph line in this State, to report, under oath, to the auditor of public accounts, on or before the first of July in every year, a full and complete statement of each line, and the whole number of miles of wire worked or under their control and management, in this State; and shall pay into the treasury on or before the tenth of July in each year, a tax equal to one dollar per mile for the line of poles and first wire, and fifty cents per mile for each additional wire." (General Statutes, chapter 92, article 4, section 4.)

This corporation has tangible property within the State, and this property, as is conceded, is subject to taxation under its laws; nor is it denied that it does an extensive business within the State, as well as out of it; and it is admitted, as has been already determined in more than one case, that this company is an agent of interstate commerce. *Telegraph Co. v. Texas*, 105 U. S. 460; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1. The lines of this company cross the boundary of the State at Louisville, and all the principal cities bordering on the Ohio river. The penalty for failing to pay this tax, and to which the agent is subjected, is a fine of \$500.

It is contended by the defense that the tax imposed is a mere arbitrary sum fixed by the State, without regard to the value of the property owned by the company, or even the income derived from it; and in addition, that specific taxation is not a tax on property, but must necessarily be a tax on the occupation or business of the person sought to be taxed; while on the other hand, it is claimed that the Legislature must judge whether the tax shall be *ad valorem* or specific, and when uniform, it must be held valid.

In this State the power of the Legislature to determine the mode of taxation, and to classify the property to be taxed, is not an open question. It may be termed a specific tax as to corporate property and an *ad valorem* tax as to property that is ordinarily the subject of taxation. A railroad company may be taxed at a certain valuation for each mile, and, if termed a specific tax, it is a taxation based on value; or the franchise itself granted by the State may be the subject of taxation, without reference to the tangible property it owns. *Cincinnati, etc. R. Co. v. Commonwealth*, 81 Ky. 492. The right of a State to tax the property of its citizens, when uniformity and equality exist in imposing the burden, cannot well be doubted; and, if this were the question presented in this case, we would have no difficulty in sustaining the tax. If this is a tax on the property of the corporation within the State, the statute imposing the burden must be enforced; but if a tax on the business of the corporation, and that corporation an agent of interstate commerce, it is then an exercise of power belonging to the national government, and must be held invalid. As said by Mr. Justice STRONG in *Railroad Co. v. Peniston*, 18 Wall. 5: "It is therefore manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agent or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does it hinder the

efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal power."

In this case the amount of the taxes alleged to be due the State for the year ending in July, 1888, is \$4,024.45, with a fine of \$500 for the failure of the corporation or its agent to pay it. It may be difficult to estimate the value of the telegraph poles and the strands of wire necessary to the conduct of the business, but it becomes apparent from the act itself, connected with the burden imposed on the corporation, that it is its occupation and business that have been taxed, without regard to the value of the property it actually owns within the State, and, with the heavy penalty imposed, it may directly interfere with the regulation of interstate commerce, and cannot be sustained. Mr. Justice FIELD, in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, says: "While it is conceded that the property in a State, belonging to a foreign corporation engaged in foreign or interstate commerce, may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of public waters over which the transportation is made, is invalid and void, as an interference with and an obstruction of the power of Congress in the regulation of such commerce." And in the case of *Leloup v. Port of Mobile*, reported in 127 U. S. 640, the court, through Mr. Justice BRADLEY, says: "The fairest and most just construction of the Constitution leads to the conclusion that no State has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on; and the reason is that such taxation is a

burden on that commerce, and amounts to a regulation of it, that belongs solely to Congress." There is no limitation to the power within the State to tax, except such as virtually amounts to a confiscation of one's property; but there is not only a limitation, but a prohibition, on the power of the State to impose a tax on the business of corporations or other agencies of interstate commerce that, in effect, regulates interstate traffic.

In both the cases under consideration, mere arbitrary sums are fixed, without reference to value, and evidently, as is to some extent conceded, on the business of each; and, whether under the guise of a specific or an *ad valorem* tax, it is manifest that the object and effect of each section of the statute is to impose burdens on the transportation or business of both corporations, and not upon the property within the State. The amount of the tax, and the penalties annexed for enforcing payment is, in effect, a prohibition of the exercise of the legitimate business of each of the appellees without first complying with the conditions of the statute. In view of the authorities cited, and the mode of enforcing this specific tax, it must be held that the two sections of the statute are in violation of subsection 3, of section 8, article 1, of the Federal Constitution.

Judgment affirmed in both cases.

NOTE.—See note at page 7, *ante*.

THE ATTORNEY-GENERAL OF THE STATE OF MASSACHUSETTS
v. WESTERN UNION TELEGRAPH COMPANY. (Three cases.)

WESTERN UNION TELEGRAPH COMPANY v. ATTORNEY-GEN-
ERAL OF MASSACHUSETTS. (Three cases.)

U. S. Supreme Court, May 25, 1891.

(141 U. S. 40.)

TAXATION OF TELEGRAPH COMPANIES.—POST-ROADS ACT.—CONSTITU-
TIONAL LAW.

The statute of Massachusetts which declares that every telegraph company, whether incorporated in Massachusetts or elsewhere, owning a line of telegraph in Massachusetts, is to be there taxed on such proportion only of the whole value of its capital stock as the length of line in Massachusetts bears to the whole length of its lines everywhere; and, to prevent its tax in that State from exceeding that amount, provides that from the taxable portion of the value of its capital so ascertained, shall be deducted the value of any property subject to local taxation in cities and towns; is not forbidden by the acceptance by the telegraph company of the rights conferred by the post-roads act or by the interstate commerce clause of the United States Constitution.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Attorney General*, vol. 2, p. 57; *Ratterman v. W. U. Tel. Co.*, vol. 2, p. 68; *Leloup v. Port of Mobile*, vol. 2, p. 79.

FACTS stated in opinion.

Henry C. Bliss, for the State of Massachusetts.

Wager Swayne, for the Western Union Telegraph Company.

Mr. Justice GRAY delivered the opinion of the court: Three informations in equity were filed in the Supreme Judicial Court of Massachusetts, by the attorney-general at the relation of the treasurer of the Commonwealth,

against the Western Union Telegraph Company, a corporation of New York, under section 54 of chapter 13 of the public statutes of Massachusetts, for the recovery of taxes assessed to the defendant for the years 1886, 1887 and 1888, under other sections of that chapter, and interest thereon at the rate of twelve per cent. a year until paid, and for an injunction against the defendant's prosecution of its business until payment of such taxes and interest.

Upon petition of defendant, alleging that the matter in dispute arose under the Constitution and laws of the United States, the three suits were removed into the Circuit Court of the United States, and were there heard upon pleadings and proofs, and decrees entered for the amounts of the taxes and interest, deducting certain sums paid into court by the defendant, and granting no injunction. Both parties appealed to this court.

These cases cannot be distinguished from that of *Western Union Telegraph Co. v. Attorney-General of Massachusetts*, 125 U. S. 530, in which the validity of similar taxes was upheld in a judgment delivered by Mr. Justice MILLER with no dissent.

The Constitution of Massachusetts, c. 1, sec. 1, art. 4, empowers the Legislature "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within, the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same." 1 Charters and Constitutions, 961.

The statutes, pursuant to which the taxes now in question were assessed and sought to be collected, are set forth in full in 125 U. S. 531-534, note, and the material provisions of them are as follows:

By section 38, "every corporation chartered by the Commonwealth or organized under the general laws, for purposes of business or profit, having a capital stock divided into shares" (with certain exceptions), shall annually return to

the tax commissioner a list of its shareholders and the number of shares belonging to each, the amount of its capital stock, the par value and market value of the shares, and the locality and value of its real estate and machinery, subject to local taxation within the Commonwealth; and "railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the Commonwealth."

By section 39, the tax commissioner shall ascertain the true market value of the shares of each corporation, and estimate the fair cash valuation of all the shares constituting its capital stock, and shall also ascertain and determine the value of its real estate and machinery subject to local taxation, and of the deductions provided in section 40.

By section 40, "every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the Commonwealth during the same current year," "upon the aggregate valuation of all the cities and towns for the preceding year." "From the valuation ascertained and determined as aforesaid, there shall be deducted: First, in case of railroad and telegraph companies, whose lines extend beyond the limits of the Commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the Commonwealth, and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the Commonwealth. Second, in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery subject to local taxation, wherever situated."

By section 42, every corporation or association, chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this Commonwealth, "shall make all returns prescribed by section 38, excepting the list of shareholders, and shall annually pay a tax, at the same rate, and to be ascertained and determined in the same manner," as is provided in section 40.

By section 54, taxes assessed under sections 40 and 42 may be recovered, "with interest at the rate of twelve per cent. per annum until the same are paid," by action in the name of the Treasurer of the Commonwealth, or by information at his relation in the Supreme Judicial Court.

It is to be remembered that by the tax act of Massachusetts "taxes on real estate shall be assessed in the city or town where the estate lies," and "all machinery employed in any branch of manufacture shall be assessed where such machinery is situated or employed; and, in assessing the stockholders for their shares in any manufacturing corporation, there shall first be deducted from the value thereof, the value of the machinery and real estate belonging to such corporation." Mass. Pub. Stat. c. 11, sections 13, 20. Although it is hard to see how telegraph companies can have "machinery employed in any branch of manufacture," unless they make their own machines, yet railroad corporations, which are coupled with telegraph companies in the statutes in question, as well as other corporations embraced in those statutes, might have such machinery.

The effect of the statutes complained of is that every telegraph company, whether incorporated in Massachusetts or elsewhere, owning a line of telegraph in Massachusetts, is to be there taxed on such proportion only of the whole value of its capital stock as the length of its line in Massachusetts bears to the whole length of its line everywhere; and to prevent its whole tax in Massachusetts from amounting in any event to more than that, it is provided that from the taxable portion of the value of its capital,

so ascertained, shall be deducted the value of any property owned by it in Massachusetts which is subject to local taxation in the cities and towns.

Such being the real state of the case, all the objections to the validity of the tax are met and disposed of by the decision of this court in the former case between these parties.

In that case, as in this, the telegraph company, while admitting that its property, in the State of Massachusetts, was subject to taxation there like other property, argued that, by reason of its having accepted the provisions of the act of July 24, 1866, c. 230, (14 Stat. 221), now embodied in sections 5263-5269 of the Revised Statutes, and having thus acquired under section 5263 "the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the railway or post-roads of the United States, and over, under or across the navigable streams or waters of the United States," it had a franchise from the United States which could not be taxed by any State through which its lines ran; that the statutes of Massachusetts, in terms and effect, undertook to tax the franchises of the corporation; and that the tax was unconstitutional and void, both as interfering with interstate commerce and as being unequal and excessive.

But this court, in answering that argument and upholding the validity of the tax, affirmed the following propositions:

The franchise of the company to be a corporation, and to carry on the business of telegraphing, was derived not from the act of Congress, but from the laws of the State of New York, under which it was organized, and it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State, and to erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay

its fair proportion of the taxes necessary to the support of the government of that State. 125 U. S. 547, 548.

By whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation; and those laws attempted to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. 125 U. S. 547.

The tax, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. Such a tax is not forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes, or by the commerce clause of the Constitution. 128 U. S. 532.

The statute of Massachusetts is intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other State; and the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not an unfair or unjust one; and the details of the method by which this was determined have not exceeded the fair range of legislative discretion. 125 U. S. 553.

That decision was cited by the court in *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, 426, 427; and in *Leloup v. Mobile*, 127 U. S. 640, 649.

* * * * *

NOTE.— See note at p. 7, *ante*.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. THE AMERICAN BELL TELEPHONE COMPANY, Appellant.

New York Court of Appeals, Nov. 26, 1889.

(117 N. Y. 241.)

AMERICAN BELL TELEPHONE COMPANY.—TAXATION.

The relations subsisting between the American Bell Telephone Company, a Massachusetts corporation, and the local telephone companies in the State of New York to which it furnishes its patented instruments and appliances, under contracts, is that of licensor and licensee, not that of principal and agent.

The business is owned and conducted by the local companies, and they alone can be taxed upon it.

The American Bell Telephone Company cannot be taxed in this State upon its capital, or gross assets, or any part thereof.

The provision in its contracts requiring leases of its instruments to patrons of the local companies to be made in its name is inserted for the purpose of protecting its property and patented rights, and cannot be properly construed as reserving to the company an interest in the business conducted by the local companies.

The fact that the American Bell Company is often or usually a stockholder of the local companies is immaterial ; the business of a corporation is not the business of its stockholders.

The nature of the business of the American Bell Telephone Company and of its contracts with local companies considered and explained.

Case of this series cited in opinion : *Commonwealth v. Am. Bell Teleph. Co.*, vol. 2, p. 90.

APPEAL from judgment for plaintiffs, upon a case submitted, entered upon an order of General Term, first judicial department. Case stated in opinion.

James C. Carter, for appellant.

William A. Poste, for respondent.

RUGER, Ch. J.: The controversy in this case is presented by an agreed statement of facts submitted by the parties, to the Supreme Court, under section 1279 of the Code, for its decision.

The plaintiffs claim the right to recover taxes from the defendant for five years, between 1881 and 1887, upon some portion of its capital stock, and upon its gross earnings in this State by virtue of the provisions of chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881, and chapter 501 of the Laws of 1885. The taxes contemplated by the statutes referred to are a certain percentage upon the amount of the capital stock of "every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this State, or now or hereafter incorporated or organized by or under the law of any other State or country, and *doing business* in this State." (Laws of 1880, chap. 542, sec. 3; Laws of 1881, chap. 361, sec. 3.)

By chapter 501 of the Laws of 1885 the tax upon the capital stock of corporations, when such stock was only partially employed in this State, was limited to so much only of such capital stock as was thus employed. Section 6 of chapter 542 of the Laws of 1880, and section 6 of chapter 361 of the Laws of 1881, authorize, in addition to other taxes and among other corporations as a tax upon its corporate franchise or business in this State, a certain percentage upon the gross earnings of "every telegraph company or telephone company incorporated under the laws of this or any other State, and *doing business* in this State."

The taxes authorized by these statutes are in addition to the usual and ordinary taxes levied upon property, and were intended to reach and tax the business and franchise only of the corporations designated.

The main question presented is whether the defendant is a corporation "*doing business in this State*" within the meaning of those words as used in the statutes. Whether the defendant during this period was, in fact, doing business in this State must be determined from the actual

character of the business carried on as disclosed by the facts contained in the submission, and not from the existence of any unexercised powers reserved to it by its contracts; for the material question is whether it has, in fact, done business within the State, and, if so, what was its nature, character and extent, and not whether it possesses the natural or contractual right to carry on such business. Some of the leading features of the business under consideration may be concisely referred to as having an important, if not controlling, bearing upon the subject.

The defendant is a foreign corporation chartered under the laws of Massachusetts and located and doing business in that State.

It is authorized by its charter "to carry on the business of manufacturing, owning, selling, using and licensing others to use, electric speaking telephones and other apparatus and appliances pertaining to the transmission of intelligence by electricity."

Practically its whole business consists in manufacturing, under its patents, and leasing to and licensing the use of telephones by others in various States of the Union. In the State of New York these licensees are corporate bodies formed therein to carry on, in certain defined localities, the business of furnishing telephonic facilities to the citizens of such communities, and they are entitled to the exclusive privilege of doing so under the Bell system. The conduct of the business is carried on under the authority obtained from the Bell Telephone Company upon the conditions and regulations contained in contracts with that company. The entire receipts for the use of telephonic facilities from the citizens of New York are paid by the customers of the respective local companies to the company of which they are respectively patrons or lessees, and such receipts constitute the entire income and earnings accruing to the Bell Telephone Company from the use and employment of its telephonic instruments in the State of New York. The contracts under which this business is done by the licensees are made at the defendant's office in Boston, and the

rentals or royalties due to it are payable monthly, in advance, at that place. The telephones are delivered to each licensee at the general office or factory of the defendant company in Boston as often as requested, and not elsewhere. The licensee transports them, at his own risk and expense, wherever he wishes, and may lawfully use them or furnish them to others for use. The licensee, when he sees fit, may return them to the defendant company at Boston, but so long as he retains them he is bound to pay the royalties thereon whether they be used or not. The business so conducted by the local companies requires, in addition to the telephones furnished by the Bell Telephone Company, the use and employment of an expensive plant; the construction and maintenance of extensive lines of poles, wires, switches and switch-boards; the service of numerous agents and employés and the management and control of an extensive business, calling for the employment of a large capital and the incurrence of serious risks in its prosecution. The Bell Telephone Company has no office or officer, agent or employé in the State of New York, unless the local corporations can be so denominated. It has no direct business relations with the public, from whose patronage the income for telephonic facilities is derived, and such income is always collected by and paid to and becomes the property of the local companies. The profits derived from the business thus carried on belong wholly to the stockholders of the respective local companies. In fact, the Bell Telephone Company is largely instrumental in procuring the organization of local companies in New York to transact the business carried on under their contracts, and has usually subscribed largely to the capital stock of such companies. As has been observed, this business is conducted under contracts between the Bell Telephone Company and the several local companies, and is usually provided for in three separate contracts adapted to the particular use intended to be made of the telephones leased. These contracts are quite voluminous, and are replete with detailed conditions and restrictions imposed upon the local

companies by the Bell Telephone Company in regard to the use to be made of their instruments. It is unnecessary to refer to these restrictions in detail, as they do not affect the problem under consideration. So far as the provisions of the contracts bear upon this controversy, they will be referred to. The patented instruments used consist of a transmitter and a receiver, costing about three dollars and a half to manufacture. The use to which the telephones may be put by the licensees is defined in these contracts as: First, Contracts for exchange systems. Second, Contracts for extra-territorial connecting lines. Third, Contracts for private lines.

The first class embraces the business of constructing lines and apparatus within a certain described area, and affording facilities for telephonic communication between the customers or subscribers of the company having control of the business in the district in which such customers reside. This embraces the usual and ordinary mode of using telephones, and covers by far the most lucrative and extensive method of employing telephones by the public. Other occasional uses are those designated as extra-territorial contracts and private lines contracts. These uses are of a limited nature, and the receipts therefrom are comparatively insignificant, amounting in the aggregate to about one-fiftieth part of the gross amount received in the business. They are significant only for the use which is attempted to be made of them through some slight differences in the provisions of the contracts relating to the conduct of the respective kinds of business.

The sums required to be paid by the local companies to the defendant company for royalties upon the instruments leased by them, vary slightly between the various local companies; and also according to the character of the use which is made of them; but is controlled, in certain instances, by a percentage upon the amounts received by the local companies from their respective customers and subscribers, and which sum is specified and fixed in each contract. The sums, however arrived at, are intended as

the measure of the compensation of the licensor for the use and employment of its telephones by the local companies. The receipts for the use of telephones are in all cases collected by the local companies, and the defendant company has no right in any case to make such collections except upon a default in the payment of royalties, or dues, by the local company, when, in some instances, the licensor is authorized, in order to protect itself from loss, to collect, in the name of the local company, so much of the dues owing to it by its customers as will satisfy the sums due and unpaid to the defendant company. It is also in some cases, upon the default of the local companies in supplying telephonic facilities to their customers, authorized to take possession of their plant and to carry on the business until satisfactory arrangements can be made for carrying it on.

The receipt by the Bell Telephone Company of the royalties and dues stipulated to be paid to it by its licensee, discharges all of the obligations assumed by the licensees under the contracts, except those incurred by the restrictions upon the mode of using telephones which were introduced in the contracts by the defendant for the sole purpose of protecting its patents, and its general interests in carrying on the business of leasing telephones for public use.

The duties and obligations of the Bell Telephone Company under their contracts may be stated concisely as an obligation to furnish the local companies at such times as they may call for them with a sufficient number of transmitters and receivers to supply the demand for the same by the patrons and subscribers of the local companies.

The obligations of the local companies are to extend the use of such instruments as much as possible ; to furnish plant, poles, wires, switch-board and switches, and other appliances to connect the instruments leased with the central office of the company, and with such other leased instruments and lines as they are permitted to connect with ; to use the instruments leased only in the prescribed modes, and to pay monthly to the Bell Telephone Company in Boston the royalties and dues upon each instrument

delivered, by whomsoever used or to whatever use it may be devoted. In the initiation of the business of furnishing facilities for communications through telephones, it is obvious that there were but two practical modes which the defendant could advantageously pursue. The first was to engage in the business of erecting plants, wires and appliances in the various towns and cities requiring such facilities, and to conduct the business through its own servants and agents. There are obvious objections to this plan, as it involved the employment of a vast capital, the incurring of enormous expense, and the conduct and control of an extensive and complicated system, beyond the capacity of a single company to successfully manage and conduct in detail. Such a system would not only have brought the property and business of the company, employed in any particular State, directly within the system of taxation authorized by the laws of such State, but would expose them to the imposition of taxes in each of such States beyond the ability of the most prosperous and wealthy corporation to bear. The second mode of conducting such business, which was the one adopted, was to apportion the territory of the Union into districts and to lease to and license the use of telephones by persons and corporations in each of said districts, to be used by them in connection with such plant, lines and appliances as they should require and supply, upon such terms and conditions as might be imposed by the licensor for the protection of its rights and the profitable and secure employment of its property, but to be conducted with capital of the licensees and under their management and control. This system would subject the business, and all property employed, and earnings derived from the business in any particular State, to taxation under the laws of the State where it is carried on. By this system the licensor retains the ownership of its patents and the supervision and ownership of all instruments manufactured thereunder, and all rights of use in the various States not expressly granted to others, with the right of manufacturing such

instruments and leasing them to be used in any unoccupied territory upon such terms and conditions as would best promote its own interests.

It was lawful for the defendant to pursue either of these courses, and it is not justly subject to censure or criticism for the course adopted, whatever it might be.

It is obvious, from the method of doing this business, that whatever special provisions may be found in the contracts, there could have been no intention on the part of the defendant or its licensees to evade taxation in this State, for, by the mode adopted, the use of telephones here is conducted wholly by corporate companies having a capital stock, possessing a place of business and owning plant, wires, poles, switches and switch-boards, necessary to carry it on, with authority to collect and receive the entire earnings for the use of telephones in their district, and subject to taxation upon all their property and business.

The case does not disclose the aggregate capital of the several local companies in the State, but it is manifest that all of the capital necessarily required in doing their business is invested in and owned by such local companies; and it is indisputable that only the capital actually employed in such business is justly subject to taxation in this State.

It is manifest, therefore, that none of the property employed in the prosecution of this business or the earnings received therefrom can escape liability for the payment of taxes in this State, and every duty and obligation owed by property owners to the State is fully satisfied and performed by them. The local companies are concededly liable for the payment of all taxes on real estate and property owned by them, and, like other corporations, they are also liable for taxes upon their capital stock and gross earnings for the business of furnishing telephonic facilities to the citizens of the State, and, unless it was intended by the Legislature in the statute referred to, to impose double taxes, it is impossible to say that the Bell Telephone Com-

pany was also liable to be taxed upon the same business or any part thereof. In the absence of a clearly expressed intention to do so, it will not be presumed that the Legislature intended to impose such taxes.

As we have before said, the sole question is, what company, in fact, conducted and controlled the business which resulted in the collection of income from the people of the State? Such business, obviously, could not have been practically or theoretically conducted in the town territory by two companies. Neither could the receipts therefrom have been the exclusive property of each of two different persons or companies. They must, necessarily, have been that of one or the other.

The contract is to be construed according to the intentions of the parties, as exhibited by its provisions and the acts of the parties under it, and, unless it can be clearly inferred from those sources of information that it was intended to create a business to be conducted practically and potentially by the Bell Telephone Company, and that such business has been actually created and pursued by them, the appeal must be sustained.

The contracts being such as were lawful for the companies to make, and showing an intention that the local companies should transact business on their own capital, owning or controlling the property with which the business was done; collecting and receiving the earnings of such business, and entitled to enjoy them as its own property, subject only to the payment of such obligations as it lawfully incurred in the prosecution of its business, it is difficult to see any foundation for the claim that the business thus carried on was not the business of such companies.

We are of the opinion that the relations existing between the parties were those of licensor and licensee and of lessor and lessee, and that the business carried on by the local companies was in no just sense that of the Bell Telephone Company.

The rights and powers of the local companies were pro-

tected by contract, and they were as secure in their enjoyment, so long as they continued to perform the obligations of their contract, as the American Bell Telephone Company was in its rights. Neither the license nor the prosecution of its business by the local company could be arbitrarily revoked, terminated or annulled by the American Bell Telephone Company, and the relations between them were in no just sense those of principal and agent.

These questions have been expressly adjudicated in the Circuit Court of the United States in Ohio, and by the Supreme Court of Pennsylvania in the cases of the *United States v. American Bell Telephone Company* (29 Fed. Rep. 17) and *Commonwealth v. American Bell Telephone Company* (18 Atl. Rep. 122).

In the former case Judge JACKSON, delivering the opinion of the court, in a similar case, says: "For one person to supply the means to another to do business on is not the doing of that business by the former. Transactions, such as the American Bell Telephone Company has had with the licensee corporations in Ohio at its place of business in Boston, and not elsewhere, are not the carrying on of business in Ohio, nor are such licensee corporations its managing agents."

We quite agree with the doctrine laid down in these cases and consider them decisive of the question presented here. The court below held, however, that the relations between the Bell company and the local companies were those of principal and agent; and that under the provisions of the act of 1880, as construed by this court in *People v. Equitable Trust Company* (96 N. Y. 387) not only the royalties payable to the Bell Telephone Company, but its whole capital stock, amounting to ten millions of dollars, was brought within the jurisdiction of this State and made subject to taxation, and that this result was obviated for the period prior to the act of 1885. only by the magnanimity of the State in neglecting to claim the whole sum which was due to it. The theory upon which this result was reached is that the local companies were practically the agents of

the Bell Telephone Company, and, therefore, that the business carried on was, in law, that of the latter company. This conclusion was based upon the effect ascribed to some of the provisions of the contracts applicable to the business called private lines, and connections with the Western Union Telegraph Company lines, and the circumstance that the Bell Telephone Company was a stockholder in the local companies.

It is argued from the provision in such contracts requiring leases to the patrons of the private lines to be made in the name of the Bell Telephone Company, that such provision made the income derivable therefrom the property of such company, and constituted the local companies its agents in respect to such business. We are unable to concur in this view. We think that court has ascribed to this provision a significance to which, under all of the circumstances of the case, it is not entitled.

In view of all of the provisions of the contract, it is obvious that the intent of this requirement was simply to place and keep the instruments leased within the supervision and ultimate control of the patentee so as to preserve their title, and effectually prevent any improper use of them by their lessees. The conduct, management and control of all this business was irrevocably confided to the local companies, and no material distinction between the various classes of business authorized by the contracts was intended to be made in respect to the powers, duties and obligations of the corporations by which it was prosecuted. The royalties and dues upon such instruments were collectable by the local companies as in other cases, and they became responsible for the payment to the Bell Telephone Company of all such royalties and dues. Much the most expensive part of the plant, lines and wires required to transact this business, was to be supplied by the local companies and remained their property, and they had control of the business done thereon and, within reasonable limits, of the compensation derived therefrom.

We think the court below gave undue effect to the pro-

visions in the contracts inserted for the purpose of guarding and protecting the rights of the patentee in its patents, and have stretched them beyond their natural design and significance when referring to them as establishing an intent to give the licensor a paramount right to control the business carried on by the use of the leased instruments.

From no point of view could the circumstance referred to have given to the State authority to tax the gross earnings of the defendant beyond the amount received under this branch of the contract and the amount of capital required to carry it on, which would naturally seem to be the cost of the telephones used in that branch; but it has been attempted to be used to transform the character of the entire business carried on by the local companies in this State.

The express concessions of the parties relating to this subject in the stipulation submitting the controversy also seems to be controlling on this subject. Thus it is agreed, as a fact, that "provisions are inserted in the contract designed to prevent the illegitimate use of such lines by unauthorized persons, or for the transmission of messages for persons other than those authorized to use such lines, and for this purpose, as well as for the purpose of guarding against infringements of patents, the contract provides that the title to the telephone shall remain in the Bell Telephone Company, and that the New York company shall cause the same to be leased in the name of the former company to such parties as the latter company shall select. * * * Rentals payable for the use of the telephones are thus in form payable to the Bell Telephone Company, but the New York company is authorized, so long as it complies with the terms of the contract, to collect such rentals, and, in fact and in practice, it does collect them, and if the American Bell Telephone Company collects any thereof, it is obliged to account therefor to the New York company. * * * The rentals agreed to be paid by the leases, although in form and in legal contemplation payable to the American Bell Tele-

phone Company, are equitably and beneficially the moneys of the New York company."

It seems to us that the concessions furnish an irrefutable answer to the argument that the provisions relating to the private lines created any practical distinction between such business and that pursued under the exchange or extra-territorial provisions.

It is manifest that so much of the argument of the court below as is based upon the fact that the American Bell Telephone Company is a stockholder in the local companies derives no support from that circumstance. In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on, and an influence in controlling its conduct; but they have created a legal entity to prosecute such business, make its contracts and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business. The taxation of a foreign or domestic stockholder in a domestic corporation upon the business of such corporation, upon the theory that it was his business, would be an unreasonable exercise of the power of taxation, and such a tax, upon the theory that a licensor or lessor, retaining title in himself to a patented article, borrowed or leased of him by some person or corporation for the purpose of carrying on a trade or business, cannot be supported upon any known principle of law.

Having arrived at the conclusion that the defendant company is not taxable at all in this State upon its gross earnings or capital stock, it is unnecessary to consider the principles upon which its capital stock should be apportioned, in case it had been taxable, in order to determine the amount of tax payable on the capital employed in this State.

In view of the inconsiderable value of the instruments owned by it in this State, and the large amount of its capital, the great value of its patents and the cost of conducting its manufactories in Massachusetts, it is by no means

clear that the mode adopted in this case of apportioning the whole capital of ten millions, according to the proportionate number of telephones used in the several States, produces a correct result. While the large amount of its capital stock owned by the defendant and its prosperity, as indicated by its liberal dividends, presents an attractive object to the vigilant financier, it should not be forgotten that the possessor of this wealth is a foreign corporation domiciled in the State of Massachusetts, and there subject to account for the obligations it incurs in return for the protection it enjoys under the laws of that State. We are quite unable to sanction a principle which would subject it to the liability of being taxed, not only in Massachusetts, where it is located, as it undoubtedly would be, under the law as laid down by us in the *People v. Horn Silver Mining Company*, 105 N. Y. 76, on its entire capital stock and gross earnings; but also in each State of the Union in which it should own telephones leased to corporations for the use of the people of such State, on such proportion of its capital stock and gross earnings as the law makers of such State saw fit to impose.

Under the rule as declared by the judgment appealed from, the defendant is now made liable to taxation upon a proportion of its capital stock and the royalties it collects from its licensees in this State, when it is also unquestionably liable to tax in Massachusetts upon all its property, as well as capital stock and gross earnings, and also as a stockholder in the local corporations, has been made liable to pay taxes indirectly upon a portion of its capital stock and all its earnings employed in the State. We do not think a construction of the agreements between these companies which produces such a result is reasonable or just, or can be reached without ascribing to the parties a design which is not fairly inferable from the language of their contracts.

We are, therefore, of the opinion that the judgment of the General Term should be reversed and judgment ordered for the defendant, with costs.

People, ex rel. v. Dolan et al., and Tierney et al.

All concur.

Judgment accordingly.

NOTE.—The same question decided in the above case was before the Pennsylvania Supreme Court, in *Commonwealth v. American Bell Teleph. Co.*, 2 Am. Elec. Cas. 90, and it was there, as here, decided, though without so elaborate argument, that the parent company could not be taxed upon its capital stock in a State where it did no business, but only leased its instruments to local companies.

Upon the same principle, to wit, that the relation between the parent and local companies is that of licensor and licensee, not of principal and agent, it was held in *United States v. Am. Bell Teleph. Co.*, 2 Am. Elec. Cas. 888, note, that such licensee corporations are not "managing agents" of the parent company, so that process in suits against the parent company could be served on them.

See note to next case.

THE PEOPLE, EX REL. THE WESTERN UNION TELEGRAPH COMPANY, Appellant, v. EDWARD DOLAN ET AL., Assessors, &c., Respondents.

THE SAME, Appellant, v. MICHAEL A. TIERNEY ET AL., Assessors, &c., Respondents.

THE SAME, Appellant, v. THE SAME, Respondents.

New York Court of Appeals, April 14, 1891.

(126 N. Y. 166.)

TAXATION OF TELEGRAPH COMPANIES.

Under the New York statute (Laws 1886, chap. 650), which provides that "the portion of any telegraph, telephone or electric light line in any town or ward in this State shall be assessed in the manner provided by law for the assessment of lands of resident owners," and that "the word 'lines' shall include the interest in the land on which the poles stand, the right or license to erect such poles on land, all poles, arms, insulators, wires and apparatus, instruments or other things connected with or used as a part of such line in such town or ward," held,

People, ex rel. v. Dolan et al., and Tierney et al.

In ascertaining the actual value of such property, the assessors had no right to assess the property in connection with its position, incidents, or the business and profits to be derived therefrom.

This, taking into consideration the fact that taxation based upon these elements is provided for by chapter 861 of the laws of 1881, subjecting telegraph companies to taxation as corporations upon their corporate franchise and business.

In assessing such property at its full and true value, as the land of resident owners must be done, the value of the poles, wires, &c., must be assessed at cost.

The interest in the land on which the poles stand, and the right or license to erect such poles on land, are also to be included in the assessment: but it should be borne in mind that this interest is only a mere revocable license. The cost to the company of obtaining the interest in the land in a public street, and the sum which the company paid to owners of land for the privilege of erecting its poles thereon or in the street adjacent thereto, would be good evidence of the value of those rights.

Case of this series cited in opinion: *American Rapid Telegraph Co. v. Hess*, post.

APPEAL from judgments of General Term, Third Department, affirming orders of Special Term quashing writs of *certiorari* in proceedings to review assessments for taxation of the relator's property in Troy. Facts stated in opinion.

Wager Swayne and *Edwin A. King*, for appellant.

William J. Roche, for respondents.

PECKHAM, J.: We have lately held in *People ex rel. West Shore Railroad Company v. Adams, Trustee, etc.* (125 N. Y. 471), that a person, under the circumstances in which this relator stood, failing to appear before the board of assessors on what is known as grievance day, is guilty of such *laches* as to warrant the court in refusing to grant him any relief in the premises.

It sufficiently appears in this proceeding that the relator did thus fail in the years 1885 and 1887.

This leaves only the assessment of 1886 open for inspection and review.

In the affidavit made on the part of the relator to procure the *certiorari* to review the assessment for that year, it is

alleged that the assessment is erroneous and illegal by reason of over valuation, and is unequal because made at a higher proportionate valuation than other real property on the roll. It is also alleged that the actual value of the property of the relator within the limits of the city of Troy, and all fixtures connected therewith does not exceed \$4,000. The writ of *certiorari* was duly issued and the defendants made return thereto, and the issues were referred to a referee to take testimony, after which the matter came on for a hearing before the court at Special Term, which made various findings of fact and upon the merits quashed the writ. Upon appeal to the General Term, that court affirmed the order of the Special Term, and from the affirmance the relator has appealed here. The court at Special Term found the value of the taxable property of the defendant and listed on the assessment-roll of Troy for the year 1886 to be at least \$12,000.

If there be any evidence to support the finding this court is concluded. But, if it appear that, in coming to that conclusion, the courts below have included improper and illegal elements as a basis for valuation, then an error of law has been made, which is reviewable here.

Upon the hearing before the referee to take testimony, the counsel for the defendants, under the objection of the relator's counsel, proved that the annual receipts of the relator's Troy office were about \$30,000. At another time before the court, the counsel for the defendants objected to proof as to the cost of setting the ordinary sized pole in Troy, because, as counsel said, the property of the company was real estate and must be valued as a whole. He also objected to evidence of the cost of freight in transporting relator's poles to Troy, because it was not competent to reduce the value of the real estate in such manner. He made the same objection to proof of the wages of employes engaged in setting the poles.

The eleventh finding of fact by the court is that "except as appears from the assessment rolls in said city, for the year 1886, there is no sufficient proof of the actual value of

the relator's telegraph property, as it was then established and in operation in the city of Troy, as part of an extensive system for transmitting information and news by telegraph."

In his opinion at Special Term, the learned judge said: "In ascertaining the value of the real estate in question, it must be regarded as a part of a whole of a complete telegraph line in operation. Its value, not as poles and wires simply, but for telegraph purposes, and its position with its connections and its productive capacity are important if not controlling considerations." At the General Term in the opinion delivered, the learned judge says upon this point: "The cost of construction was by no means controlling as to the value of the relator's property in Troy. That was only an integral part of a great system which extended over the entire State, and by itself might be of little value as compared with its value as a part of the entire system." And in his brief before this court, the learned counsel for the defendants, in justifying the valuation placed upon the relator's property by the assessors and by the court at Special Term, uses this language: "In ascertaining the actual value of such property, the assessors had the right and it was their duty to look beyond the cost of specific material at wholesale prices, and the cost of the labor, and to estimate such property not as an isolated piece of land, but in connection with its position, its incidents and the business and profits to be derived therefrom."

It is thus seen that it has been assumed as a fact by the courts below, and it is conceded by counsel, that the defendants pursued the method above mentioned of determining the value of the property of the relator in the city of Troy for purposes of local taxation. The question now to be decided is whether this method or system is valid.

For the purpose of fixing the manner of assessing what the Legislature denominated "certain real estate of telegraph companies," it passed, in the year 1881, an act (chap. 597 of the laws of that year), by which it was provided that telegraph companies in the State should, on a certain day in each year, make a sworn statement showing the total length

of their lines in each county, with the cost of construction and equipment thereof, and the assessors within each county were to assess for purposes of taxation such proportion of the cost of construction as the length of the lines in the district of the assessors bore to the total length of the lines in the county.

The Legislature at the same session passed the act (chap. 361) taxing the corporations therein named in the manner stated. Among such corporations are telegraph companies. The tax is declared to be one upon the corporate franchise or business of the corporation, is payable annually, and is computed upon the par value of the capital stock, the percentage of tax depending upon the amount of dividends paid by the company, or if no dividends or a less amount than six per cent. is paid, then the tax is to be at the rate named in the statute upon a certain valuation of the capital stock. In addition to this tax, and by the same act, the companies named therein are to pay to the State treasurer, as a further tax on their corporate franchises or business in the State, a certain tax upon the gross earnings in the State for the business therein. These two acts of the Legislature should be construed together as *in pari materia*, and in them is provided a system for the taxation of the property of telegraph companies, their franchises and business (exclusive of real estate, in the ordinary acceptation of that term, which might be owned by them). This system continued until 1886, when the Legislature passed the act providing for the assessment of telegraph, telephone and electric light lines, and known as chapter 659 of the laws of that year. This act should also be construed in connection with the act of 1881, chap. 361. The important sections are 1 and 2, and they read as follows :

Section 1. The portion of any telegraph, telephone or electric light line in any town or ward in this State shall be assessed in such town or ward to the owner, or person, or corporation, or association in control thereof, in the manner provided by law for the assessment of lands of resident owners,

and the same proceedings may be had upon such assessment, and for the collection of any tax levied thereon.

Sec. 2. The word "lines" shall include the interest in the land on which the poles stand, the right or license to erect such poles on land, all poles, arms, insulators, wires and apparatus, instruments or other thing connected with or used as a part of such line in such town or ward, and belonging either to the owner of such line or the person, corporation or association in control thereof.

This act superseded that of 1881, chapter 597.

Of course the land, that is a house and lot or a vacant lot of ground, owned by a telegraph company, is assessed to it in the same way it would be to any other owner. The act of 1886 does not allude to real estate or land strictly so-called. It refers to the telegraph "line" in the town or ward, and it is to be assessed in the manner provided by law for the assessment of lands of resident owners.

It being thus necessary to assess the lines as lands in the manner provided by law for the assessment of lands of resident owners, and the statute providing that the word "lines" must include, among other items of value, the interest in the land on which the poles stand and the right or license to erect such poles on land, it becomes necessary to inquire what is the manner provided by law for the assessment of lands of resident owners. The Revised Statutes provide the manner. (1 R. S. 389, tit. 2, art. 1.) The resident is to be assessed in the town or ward of his residence when the assessment is made for the lands owned by him within such town or ward, and the full value of such land is to be set down by the assessors in a separate column in their assessment roll. The assessors are to estimate and assess the land at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor. This is the manner provided by law for the assessment of lands of a resident owner.

What is the full and true value of this property of a telegraph company, and how is it to be arrived at? To enact that certain things shall be regarded as and included in the term "land" or "real estate," does not in the least alter the essential nature or characteristics of the things

which are to be thus called. To say that the word "land," when used in the law with reference to taxation, shall include not only the land itself, but all telegraph lines, wires, poles, arms, insulators, apparatus and instruments, does not change their essential nature. They remain articles which are manufactured, and which can be duplicated and supplied to any required extent at a certain known cost of production. The company may be able to procure the instruments, poles or wires at a less cost than others, owing to their special advantages, but any one can procure such articles in all the quantities desired. The supply has always kept pace with the demand. The value of the poles, arms, insulators, apparatus, instruments and wires would, therefore, consist of the cost of production, meaning by that term to include the value of the labor necessary to set them up and place them ready for use. If any of these articles were patented, and the company did not own the patent, the price paid therefor would be their value where they could be furnished indefinitely as desired. To call these things land does not make them land in their nature. As they are capable of indefinite reproduction at a known cost, that cost must, in the nature of the subject, be their value for the purpose of the statute. And when that cost is shown by evidence which is uncontradicted and in no way doubtful, or in fact doubted, then such cost must be deemed the value of those separate articles. But this is not all that shall be taxed under the provisions of the statute.

The interest in the land on which the poles stand, and the right or license to erect such poles on land, are also to be included in the assessment of the property of the company. What is the nature of the interest in the land on which the poles stand? We have held in *American Rapid Telegraph Co. v. Hess*, (125 N. Y. 641), that a telegraph company, organized under the act of 1848, and obtaining from it the right to construct its lines of telegraph upon the public streets or highways, acquired no absolute interest in the highway or the land, and that it was subject to the police

power of the State, wielded through its municipal agencies, which could direct the lines to be taken down and placed in such highways provided for them.

This interest in the land in a street is in reality nothing more than a license granted by the State. In the language of the act, it is an authority to construct lines along and upon the public roads and highways. This license may also be revoked by legislative enactment. It was so stated in the case heretofore cited (*American Rapid Tel. Co. v. Hess*), and we feel strengthened in our views in that case by further reflection. Therefore, the value of the interest in the land in which a pole is placed in a public street by a telegraph company must be arrived at in consideration of the important fact that such interest is a mere license and revocable at the pleasure of the Legislature. It must also be observed that any other telegraph company organized under the general law may avail itself of the same license to enter upon the public streets. So there is really no title whatever in the company to the land thus used, and its only interest is subject to extinguishment by the Legislature at any time. The cost which the company incurred in obtaining the interest in the land in a public street would in this case, taking into consideration all the acts providing for the taxation of the company, be a correct criterion by which to judge its value. As to the value of the right or license to erect the poles on land, also spoken of in the act, much the same reasoning is to be adopted. This right or license is one which any company may avail itself of if incorporated under the general act, and it costs nothing.

If the company, in placing its poles on the land of any individual, shall have paid anything to the owner of the land for such use, or incurred any contractual liability to him, the amount paid, or the amount included in such liability, would be good evidence of the value of the right. There might be other elements entering into that question, but in this case all the poles seem to have been placed exclusively in the public streets. If the company should pay an abutting owner on a public street or highway

for the use of the interest, or any part of it, which the owner may have in such street or highway, such payment would be part of the cost of obtaining the interest in the land and the right to therein erect the poles. Taking the cost of the production of those articles, which are in their nature personal property and capable of infinite production, as above described, and adding to that cost the value of the interest in the land on which the poles stand and the value of the right to erect such poles on the land, upon the principles above indicated, and we have the total elements entering into the full and true value of the property of the company subject to taxation under the act of 1886 above cited. In the assessment for taxation under that act, the property is not to be regarded as a part of a whole, nor as a complete telegraph line in operation. Its value for telegraph purposes, and its position with its connections, and its productive capacity, are not considerations entering into the value of the property under the act last named. These considerations are foreign to its purpose. They largely enter into the question of the value of the business and the franchises of the company, and the value of such business and franchises is to be assessed under the act of 1881, already quoted. If it were not for that act and its provisions for assessing the value of the business and franchises of telegraph companies for the purpose of taxation, it may be that courts would strive to give a wider meaning, if possible, to the language of the act of 1886, for the purpose of reaching these subjects of taxation. But when they are already taxed under a separate act, it cannot be supposed that the Legislature intended to tax them again proportionately in every tax locality in the State.

It is obvious that the learned courts below, in arriving at their conclusions as to the proper facts to consider in deciding the question of the value of the property of the relator, viewed it as if such property were real estate in the narrow acceptation of the term, such as a piece of ground on which a house was erected or rails laid, and which was owned by the relator in fee. The authorities cited in

support of their proposition relate to railroads or bridges forming part of real estate owned in fee by the companies. In such cases it is held that in determining the value of such real estate, its earning capacity is a most important feature, and that in assessing the real estate of a railroad it is to be assessed not as an isolated piece of property, but in connection with its position, its incidents and the business and profits to be derived therefrom; its productive capacity and its earnings are all to be considered, and the cost of the whole road is to be taken into account. *People, ex rel. v. Barker*, 48 N. Y. 77; *People v. Hicks*, 40 Hun, 600; *People, ex rel. v. Weaver*, 34 id. 322.

In this case under the statute of 1886, as to telegraph companies, different language is used and a different kind of property is intended to be reached for assessment. The poles, wires, instruments, arms, insulators and apparatus are included in the word "lines" in the statute, and they are to be assessed in the manner provided by law for assessing the lands of residents. The statute points out how that is to be done, and the property is to be assessed at its full value, together with the interest in the land on which the poles stand and the right to erect such poles on the land. This interest and this right differ wholly in character and nature from the real estate owned in fee by the railroad or bridge company, and the rules for the valuation of that species of property are by no means appropriate for the purpose of arriving at the full value of the property of the telegraph company as enumerated in the statute of 1886. Most of this property, it is seen, is personal property, and it is called land, although the poles are placed in streets which do not belong to the company and in which the company has, as we have seen, no interest of a strictly legal nature. The railroad or bridge company, on the contrary, does own the fee of the real estate upon which it places its superstructure of rails or bridge, and the question arises what is the value of this real estate owned by the company upon which this superstructure has been placed and which is used for railroad or bridge purposes? The question involves

almost necessarily the inquiry as to the profitableness of the superstructure which has been placed thereon and which forms part and parcel of the real estate upon which it is laid, and this can only be answered by regarding the real estate as part of a whole portion of real estate devoted to the railroad or bridge purpose. The land, the portion of earth on which the rails rest, is owned by the company, and the company to that extent has a monopoly. This land cannot be increased or reproduced. The structure having been placed on it, becomes a part of it, and it must all be appraised at its full value as an integral part of a whole or completed instrument created for the purpose of realizing pecuniary profit. The cost of each particular portion of real estate, while one element to be considered for the purpose of determining the question of profits, cannot in the nature of the property be regarded as the one important consideration for the purpose of arriving at its full value for taxation.

Without continuing the comparison it seems to me there is a clear, radical and important difference in the very nature of the properties to be taxed, and which should lead to a different rule in the assessment of what is in fact real estate or earth in the one case, and personal property in the other, although called land.

* * * * *

The orders of the General and Special Terms, so far as they relate to the assessment of 1886, should be reversed and that assessment should be set aside, with directions to the assessors to reassess the property of the corporation for the year 1886, in conformity with the principles laid down in this opinion, and the orders of the General Term, so far as they relate to the assessments of 1885 and 1887, should be affirmed. No costs to either party on any appeal.

All concur.

Ordered accordingly.

NOTE.—The decision of this case by the General Term of the Supreme Court, as to the assessment of 1886, is reported, 57 Hun, 857. Separate opinions were also written as to the assessments of 1885 and 1887, but were

not officially reported. They are not very important, for it will be observed that they were affirmed by the Court of Appeals simply on the ground that no complaint had been made on "grievance day."

In the General Term opinion upon the 1886 assessment, which was reversed by the above reported decision, the constitutionality of the statute (laws 1886, ch. 659) under which the tax was levied was considered, a question which the Court of Appeals did not discuss. That portion of the General Term opinion is as follows:

But it is insisted by the relator that section 8 of chapter 659 of the Laws of 1886, so far as the assessors acted under or by authority of the same, is in violation of article 1, section 8, of the Constitution of the United States, and, therefore, illegal and void, as it affects interstate commerce, and is, therefore, subject to the Federal jurisdiction.

It is conceded that the relator is a corporation created under the laws of New York, and there is no proof in this case that its lines extend beyond the limits of the State of New York. But it is insisted that this court should take judicial notice of the fact that the relator conducts an interstate business and is the agent of the Federal government for certain purposes under the act of July 24, 1866. (U. S. R. S., 5268-5269.)

We have not been cited to any authority holding that the court, on appeal, can take judicial notice of the existence or operation of the telegraph lines of the relator outside of its territorial jurisdiction without proof of their existence.

While there are certain facts of a public nature of which the court may take judicial notice, still we understand the rule to be that they must be of a public nature, such as the political divisions of the country, public statutes, the *de facto* existence of independent nations, and the existence of a state of war between such nations; but the fact that an act of Congress has made it possible for a telegraph company, which is purely a private corporation, created under general laws, by which certain restrictions and limitations are imposed, to, under certain restrictions, establish business relations with the Federal Government, does not, we think, without proof that such relations have been formed, justify the court in assuming that it extends beyond the limits of the State, and has assumed such relations with the United States as to deprive the State by which it was created, and in which it is proved to have property liable to taxation, from exercising its taxing powers.

It cannot, therefore, be claimed, under the evidence in this case, that the exercise of the taxing power upon the relator's property in the city of Troy is an interference with the constitutional rights of the Federal Government to "regulate commerce * * * among the several States" within article 1, section 8, subdivision 3, of the Federal Constitution, especially as there was no finding by the court or request by the relator of the court to find that the telegraph extended into other States, and no evidence to establish that proposition.

The case of *Leloup v. Port of Mobile* (127 U. S. R., 645) does not seem to be in point in this question. In that case the proof showed that a large

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part of the relator's business was interstate and international, and the tax imposed seems to be a license tax, and the question propounded by the court was: "Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege?" and the court answers: "If it can it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that can be done." That is not this case, no license tax is sought to be imposed. The tax purports to be a tax upon the relator's property, and not upon its right to do business; and to hold that a tax upon the property of a corporation within the State, even if we assume that it is connected with lines in other States, was a tax upon interstate commerce and prohibited by the Federal Constitution, would, it seems to us, exempt from State taxation many of the great railroads and other corporations within this State, and thus practically exonerate and relieve them from all taxation.

It was entirely competent for the Legislature to authorize the taxation of "telegraph lines." "Lines shall include the interest in the land on which the poles stand, the right or license to erect such poles on land, and all poles, arms, insulators, wires and apparatus, instruments or other thing connected with or used as a part of such line in such town or ward." (Chap. 659, laws of 1856.)

See note, vol. 2, page 92.

THE CITY OF PHILADELPHIA V. THE WESTERN UNION
TELEGRAPH COMPANY.

U. S. Circuit Court, E. D., Pennsylvania, Oct. 23, 1889.

(40 Fed. R. 616.)

MUNICIPAL LICENSE FEE.

A municipal corporation cannot impose a tax upon telegraph companies, but it is its duty to subject them to such conditions, restrictions and supervision as are necessary to the public safety; and consequently it may impose such charges as will enable it to perform such duty without loss to itself. If an ordinance do no more than this it is reasonable, and therefore valid; otherwise it is not.

Accordingly held, that an ordinance imposing a charge of \$16,000, when not to exceed \$5,500 was necessary for the purpose aforesaid, imposed a tax and was void.

ACTION to recover license fees imposed by a city for the privilege of erecting and maintaining telegraph lines in streets.

Removed from Common Pleas No. 4, of the city of Philadelphia.

Motion for judgment, notwithstanding verdict on point reserved.

Charles T. Warwick, city solicitor, and *R. Alexander*, assistant city solicitor, for plaintiff.

Read & Pettit, for defendants.

BUTLER, J.: On the trial defendant presented the following point: "Under the evidence in this case the license fee sought to be recovered by the plaintiff is much more than the cost of the regulation and excessive; it is therefore unreasonable in law and void, and if you believe the evidence in the case, your verdict must be for the defendant." The point was reserved, and the court submitted the case to the jury under the following instructions: "The city of Philadelphia sues to recover license fees under the ordinance before you. Whether the ordinance is valid or not depends upon the question whether it is reasonable, as respects the amount required to be paid, by the defendant and other similar companies using lines or wire within the city. The city cannot tax these companies, and does not, as declared by counsel, seek to do so. Nor can it prohibit them from establishing and maintaining their lines; but it can subject them to proper regulations and supervision, with a view to the protection of persons and property. It is the duty of the city to prescribe such regulations and conditions, and to exercise such supervision. If it failed in this it would be responsible to citizens who might be injured either in person or property. It is readily seen that the construction and maintenance of these lines subjects the city to serious responsibility, and considerable expenditure, and for this

the city may demand indemnity and reimbursement. Thus, you observe, the question is, as before stated, is the ordinance reasonable? The city has power to enact such an ordinance if its exactions are not excessive. In passing upon the question of excessiveness, the city should not be subjected to a contracted or narrow view, but be treated with fair and reasonable liberality. Turning now to the evidence you must determine whether the ordinance is reasonable." The jury have found for the plaintiff; the point must now be disposed of. It embraces the entire case, the validity of the ordinance, judged by the testimony. The facts were submitted to the jury, for reasons stated at the time, which need not be repeated here. Nor need we enlarge on the charge respecting the parties' rights. There is no controversy on the subject; nor is there room for controversy. The plaintiff cannot tax the defendant, not only because he is not authorized to do so, but because the State is without power to confer such authority. The imposition of a tax would be an interference with interstate commerce and thus be an infraction of the Federal Constitution. The plaintiff may be and is in duty bound to subject the defendant, and other similar companies, to such proper conditions, restrictions, and supervision, respecting lines within its limits, as are necessary to public safety, and consequently to such charges as will enable it to perform its duty, without loss to itself. If the ordinance does no more than this it is reasonable, and therefore valid; otherwise it is not. Does it do more? The question, in view of the evidence (about which there is no disagreement), is too narrow to admit of discussion. A statement of the facts disposes of it. The experience of several years shows that \$3,000 or at the most \$3,500 per year is sufficient to cover every expenditure the city is required to make on this account. The ordinance imposes the payment (in round numbers) of \$16,000 annually. This is five times the amount required. It seems to follow, as a necessary consequence, that the ordinance is unreasonable.

It compels a payment annually of about \$14,000 in excess

of the amount necessary. This is a tax pure and simple. The city cannot collect and lay by a sum to insure itself against imaginary future demands which may possibly arise. If it properly discharges its duty of control and supervision no such demands can arise. It is responsible alone for vigilance and care in these respects. It may, possibly, at some time, be subjected to expenditure in resisting unjust claims. This, judged by the past however, is not probable. A very trifling annual surplus would provide for it. But as the contingency is remote, such provision may well be left until it occurs. The only embarrassment we have felt in reaching this conclusion arises from the fact that the State courts, the Common Pleas of this city and the Supreme Court, adopted a different one in previous suits under this ordinance. Our very great respect for these courts would impel us to give their judgments controlling weight, if we could find anything to support them in the testimony before us. Judgment must be entered for the defendant, notwithstanding the verdict.

NOTE.—The right of municipal corporations to impose reasonable license fees upon telegraph companies, as a proper exercise of their police powers, was upheld in the following earlier cases of this series *City of Chester v. W. U. Tel. Co.*, vol. 2, p. 93, *W. U. Tel. Co. v. Philadelphia*, vol. 2, p. 98; and the same as to electric light companies in *Lancaster v. Edison Elec. Illum. Co.*, vol. 2, p. 116. But the right of an incorporated borough, though having police power, to require such a fee of telephone companies was denied in *Philipsburgh v. Teleph. & Supply Co.*, vol. 2, p. 105. All the above mentioned cases were decided in Pennsylvania. In *Wisconsin Teleph. Co. v. Oshkosh* (Wis.), vol. 1, p. 687, the right of a municipal corporation to require a license fee of telephone companies as a condition of maintaining lines in streets was denied, such maintenance being expressly permitted by State statute.

CITY COUNCIL OF CHARLESTON V. POSTAL TELEGRAPH
CABLE CO.

Court of Common Pleas, Charleston Co., South Carolina, January, 1891.

(9 Railway & Corporation Law Journal, 122.)

CONSTITUTIONAL LAW.—POST-ROADS ACT.—MUNICIPAL LICENSE.

Under a statute permitting a municipal corporation to demand a license fee for the transaction of any kind of business within its limits, an ordinance imposing such a fee upon a telegraph company as to all business done within the State is *ultra vires* and void.

Such an ordinance, in not excepting telegrams received by officers and agents of the United States, is in violation of the post-roads act of Congress.

Both ordinance and statute are unconstitutional and void so far as they undertake to restrain or restrict the business of telegraph companies which have availed themselves of the privileges of said act of Congress.

Cases of this series cited in opinion: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *Ratterman v. W. U. Tel. Co.*, vol. 2, p. 68; *Tel. Co. v. Texas*, vol. 1, p. 378; *W. U. Tel. Co. v. Attorney-General of Mass.*, vol. 2, p. 57.

Charles Inglesby, corporation counsel, for the plaintiff.

R. S. Guernsey (*Mordecai & Gadsden*, attorneys), for the defendant.

IZLAR, J.: This case was heard before me by consent, Corporation Counsel, Mr. Charles Inglesby, representing the plaintiff, and Messrs. Mordecai & Gadsden the defendant, a jury trial having been waived, on the complaint and answer and certain admitted facts hereinafter referred to.

This is an action brought by the city council of Charleston to collect from the defendant corporation a license tax of \$500, alleged to be due under the provisions of an ordinance of the city council of Charleston, entitled "An ordinance to regulate licenses for the year 1890," ratified

December 23, 1889. The ordinance in question, after providing that all persons or corporations engaged in or intending to engage in any trade, business or profession shall obtain on or before January 20, 1890, a license therefor (section 1) provides (section 2) for registry with the city treasurer; section 3 provides a penalty for the failure to take out license; section 4, for its exposure in public place of business, house or office; section 5, for removal from one place of business to another; section 6, as to the issuance of exempt or free cards; section 7, that the license shall continue in force until December 31, 1890; section 8 refers exclusively to dogs, horses and wagons; section 9, that application shall be made for licenses to the city treasurer; section 10 provides for the transfer of licenses under section 11, which reads as follows:

Section 11. For licenses to carry on any trade, business or profession hereinafter mentioned, the following sums shall be paid to the city treasurer, namely: Class 1—Agencies or companies each—. Class 36—Telegraph companies or agencies each for business done within the State and not including that done without the State, \$500.

The alleged authority for the passage of this ordinance is an act of the General Assembly of South Carolina, approved December 17, 1881, as follows:

An act to authorize the city council of Charleston to impose a license tax on all persons engaged in any business, trade or profession, in the city of Charleston. Section 1. Be it enacted by the Senate and House of Representatives that the city council of Charleston be and are hereby authorized to require the payment of such sum or sums of money not exceeding \$500 for license or licenses, as in their judgment are just and wise, by any person engaged or intending to engage in any calling, business or profession, in whole or in part, within the limits of the city of Charleston, except those engaged in the calling or profession of teachers and ministers of the gospel. Section 2. The said city council of Charleston is hereby authorized to pass such city ordinances as are necessary to carry the intent and purposes of this act into full effect.

It is admitted that the defendant corporation is a telegraph company duly incorporated under the laws of the

State of New York, and is entitled to all the privileges and immunities allowed to telegraph companies under the provisions of an act of Congress of the United States of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes" now known as section 5263 *et seq.* of the Revised Statutes of the United States, and commonly known as title 65 of said Revised Statutes. That on and previous to August 12, 1890, it was and still is engaged in the business of transmitting messages by telegraph to and from the city of Charleston, S. C., to numerous points beyond the limits of that State as well as in the transmission of messages for the government of the United States between its officers from the city of Charleston to points beyond the State of South Carolina as well as from the city of Charleston to points within said State, and that it then had and has an office for the transaction of said business in the city of Charleston as well as in the city of Columbia and six other places within the State, and during said period did transmit messages over and from the Charleston office to said other offices within the State, including the city of Columbia, at the same time being engaged in interstate commerce and the transmission of messages for the government of the United States between its various agents and officers.

It is also admitted as a fact proved in the case that the city of Columbia, under the provisions of an ordinance entitled "An ordinance to regulate licenses of the year 1890," has demanded of the defendant corporation a license of \$250 under the provisions of that ordinance as follows:

Section 7. For a license to carry on any permanent or transient business or profession, the sums hereinafter mentioned shall be paid into the city treasury in gold and silver coin, United States treasury notes, national bank notes, gold and silver certificates or past due coupons of new funded city debt. Telegraph companies or agencies for business done within the State and not including that done without the State each, \$250.

It is further admitted that the daily mails of the United States are carried and delivered regularly under the

authority and by the direction of the postmaster-general over all the roads leading out from the city of Charleston through the State of South Carolina, and thence to the State of Georgia and adjoining States, as well as the streets of the city of Charleston, through which said streets said lines of telegraph run, and that all of said roads, as well as the streets of the city of Charleston, are post-roads of the United States.

All of the material facts alleged in the answer are, for the purpose of this hearing, admitted to be true, and therefore need not be here specifically set forth.

After a careful consideration of all the authorities cited in argument and of the issues raised in this case, I am of the opinion that the view taken by the counsel for the defendant is not only correct but sustained by the authorities cited by them; and as conclusions of law I therefore find as follows, to wit:

First. That the ordinance ratified by the city of Charleston on December 23, 1889, is *ultra vires* and void in so far as it undertakes to impose a license upon this defendant for "business done within the State and not including that done without the State."

Second. That this ordinance, in not excepting telegrams sent and received by the officers of the United States and its agents, is in violation of the provisions of the act of Congress of July 24, 1866, now known as section 5263 of the United States Revised Statutes.

Third. That the defendant corporation, having accepted the restrictions and obligations of said Act of Congress of the United States, of July 24, 1866, now known as section 5263 of the Revised Statutes of the United States, occupies the position of an agent of the United States government for the transmission of public business, and as such cannot have such a license imposed upon it as is sought to be enforced by the ordinance under consideration, and that therefore said ordinance, as well as the act of the General Assembly of South Carolina, under which it is claimed to have been passed, is in contravention of section 5263 of the

Revised Statutes of the United States and in violation of so much of section 8, article 1, of the United States Constitution as confers upon Congress the power to establish post-offices and post-roads.

As to the first conclusion—that the ordinance ratified by the city council of Charleston on December 23, 1889, is *ultra vires* and void in so far as it undertakes to impose a license upon this defendant for “business done within the State and not including that done without the State.”

The general propositions that municipal corporations have no inherent power to levy taxes, and that the grant of such must be plain and unmistakable—and that municipal corporations are held strictly within the limits of the power granted (2 Desty's Fed. Const. 1054) are such clearly recognized propositions of law that we deem the citation of further authority unnecessary save the two below quoted:

“The charter or the general law under which they (municipal corporations) exercise their powers, is their constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers acting by a delegated authority, so that while the State Legislature may exercise such powers as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant.” Cooley's Const. Lim., 6th ed. 228. “And the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign them; thus applying substantially the same rule that is applied to charters of private corporations.” *Ib.* 231. “The powers conferred upon municipal governments must also be construed as confined in their exercise to the territorial limits within the municipality; and the fact that these powers are conferred in general terms will not warrant their exercise except within those limits.” *Ib.* 263. A municipal corporation

has no power to levy taxes without express authority granted in its charter for that purpose. *State, ex. rel. Atkins v. Maysville*, 12 So. Car. 76.

The question here is not as to the right of the State to impose for itself or authorize a municipality to impose for its benefit within its limits, a tax upon the real and personal property of a telegraph company, in other words, to tax the *rem* within the limits within which it is found, for the defendant company does pay to the State and each county, as well as the several cities in which it has offices, taxes upon its plant and other assets. The question here is, as to the right to impose a license tax, or in other words, to impose a condition precedent to the carrying on of the business of a telegraph company. If the ordinance of the city of Charleston is enforceable, then the proposition is that the city of Charleston has the right to compel this company, as a condition to its doing business, to pay into the treasury the sum of \$500 not to be taxed for the business which it may do within the limits of that city, as derived from messages sent from or received there from other points within the State of South Carolina, but for business done within the State. In other words, the city council of Charleston assumes to itself the right to tax, by way of license, the entire business of the defendant company within the limits of the State of South Carolina, and so, too, the city of Columbia claims the same right and demands a license for the same thing, and for all we know to the contrary, the terms of Aiken, Barnwell, Summerville and any other town in which the defendant company may have an office, might pass a similar ordinance under the provisions of its legislative grant, and so this defendant will be in the position of contributing from two to eight times and possibly more for carrying on the same business, based upon the same income, from the same sources, namely, business done within the State of South Carolina. The bare statement of these facts shows the manifest invalidity of the alleged ordinance, and that it is *ultra vires* and must be so held. The legislative grant to

Charleston is to impose a license tax only for business done within the limits of the city—there it stops, and when the ordinance undertakes to go beyond that, it ceases to be valid.

As to the second conclusion, that this ordinance, in not excepting telegrams sent and received by the officers of the United States and its agents, is in violation of the provisions of the act of Congress of 1866, and known as section 5263 of the United States Revised Statutes. And herein we are necessarily brought to discuss the third conclusion: That the defendant corporation, having accepted the restrictions and obligations of the act of Congress of the United States of July 24, 1866, now known as section 5263 of the Revised Statutes of the United States, occupies the position of an agent of the government of the United States for the transmission of messages on public business, and as such cannot have such a license imposed upon it as is sought to be enforced by the ordinance under consideration; and that, therefore, said ordinance, as well as the act of the General Assembly of South Carolina, under which it is claimed to have been passed, is in contravention of the provisions of section 5263 of the Revised Statutes of the United States, and in violation of so much of the provisions of section 8, article 1, of the United States Constitution as confers power on Congress to establish post-offices and post-roads.

In *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, the Supreme Court of the United States, by WAITE, C. J., declares the rights of telegraph companies under that section of the Revised Statutes. They hold in that case that any State law which undertakes to restrict the business of telegraph companies is in violation of that section of the Revised Statutes of the United States. That case, it is true, was based upon a statute of the State of Florida, granting an exclusive right to the Pennsylvania Company to maintain lines of telegraph, but the principle involved is the same as that which we are now discussing, namely, the right of the State to interfere by hostile legislation with

the business of telegraph companies, not the right to impose a tax upon its property, but to restrict its operations and practically prohibit it from doing business in this State, unless the provisions of its act are complied with, and this goes further and holds that the provisions of that act extend to the public domain, the military and post-roads and the navigable waters of the United States. As the court in that case well says: "The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all" (p. 10). It is stated in that case, that the statute of July 24, 1866, "declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege" (p. 11).

In *Ratterman v. Western Union Tel. Co.*, 127 U. S. 416, 425, this *Pensacola* case referred to with approval, as establishing the proposition that "the telegraph was an instrument of commerce; that telegraph companies were subject to the regulating powers of Congress in respect to their foreign and interstate business, and that such a company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods," and commenting on *Tel. Co. v. Texas*, 105 U. S. 460, Judge MILLER said that the court, in reviewing the decision of the Supreme Court of the State of Texas, which had allowed no deduction for taxes on messages sent out of

the State or for the government on public business by its officers and agents, said: "It follows that the judgment, so far as it includes the tax on messages sent out of the State or for the government on public business, is erroneous. * * * Any tax, therefore, which the State may put on messages sent by private parties and not by the agents of the government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States"—that is to say, will not be an interference with interstate commerce—but distinctly states upon page 427 that in the present case, counsel for the telegraph company can claim no benefit from the provisions of section 5263 of the Revised Statutes because it does not appear that any part of the company's lines come within the description of that section of the Revised Statutes.

In other words, *Ratterman v. Western Union Tel. Co.*, 127 U. S. 410, decides, construing *Pensacola v. W. U. T. Co.*, 96 U. S. 1, and *Tel. Co. v. Texas*, 105 U. S. 460, that within its own borders no State can tax for government messages sent by government officers; and as to what effect section 5263 would have as to an exemption from taxation has not been made in this case, and the court is not called upon to decide it because it does not appear that any part of the line of the company comes within the description of that section.

In the case at bar all the company's lines come within its provisions; and so this same case construed what the same judge meant to decide in the case of *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530. There, from the facts in the case, that section of the Revised Statutes was held out to apply to certain portions of the company's lines built within the State of Massachusetts, which were admittedly not post-roads of the United States, and therefore not within the inhibition of the statute.

In *Railroad Co. v. Peniston*, 18 Wall. 36, cited by the corporation counsel, the court clearly draws the distinction between the taxation of property of the defendant

within the jurisdiction of the State, and a tax upon the operations of the company: "It is therefore manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of the power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers. In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson v. Union Pacific*, 9 Wall. 579. It is not imposed upon the franchises or right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company is authorized to do. It is not the transmission of messages nor the transportation of United States mails or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the State of a similar character." *Railroad Company v. Peniston*, 18 Wall., at p. 36. (Judge MILLER sat on the hearing of this case and concurred in the judgment of the court.)

The ordinance as we have it does not except government business sent by agents of the government of the United States from one place to another, even exclusively within its own jurisdiction, and by undertaking to buy a license for business done within the State, it necessarily includes such government business and is therefore clearly in violation of the act of Congress and must be so construed.

It will be noted that in the *Ratterman* case, as well as in the *Massachusetts* case, the tax to be imposed was upon the property, real and personal, of the company — not

upon the occupation—and was a State tax for State purposes within the bounds of State sovereignty for its own benefit and protection—not a grant to a municipal corporation of a restrictive power to perform a particular act.

The *Texas* case, as interpreted by Judge MILLER in *Ratterman's* case, expressly decides that government business must be exempted, and if instead of being an ordinance of the city of Charleston, it were an Act of the General Assembly of South Carolina, authorizing the State to enact a license for business done within the State, a failure to exclude government business would render the act repugnant to section 5253 and therefore void.

Wherefore, it is ordered, adjudged and decreed, that the complaint herein be dismissed with costs, and that the defendant have leave to enter up judgment against the plaintiff for their taxed costs in this action.

NOTE.—See *W. U. Tel. Co. v. City of Richmond*, 1 Am. Elec. Cas. 149, in which the Supreme Court of Virginia came to an opposite conclusion upon similar facts to those in the above case.

As to the right of States to tax telegraph companies, as affected by the interstate commerce provision of the United States Constitution and by the post-roads act of Congress, see note, *ante*, p. 7.

THE ELECTRIC RAILWAY COMPANY OF GRAND RAPIDS V.
THE COMMON COUNCIL OF THE CITY OF GRAND RAPIDS.

Michigan Supreme Court, Dec. 24, 1890.

(84 Mich. 257.)

MUNICIPAL CONTROL OF POLES IN STREETS.—MANDAMUS.

The imposition by the city of Grand Rapids, as a condition of permitting the erection of poles in its streets by an electric railway company, of a requirement that the company furnish transfer tickets to its patrons, without extra cost, over certain of its lines, held inoperative and void as in conflict with the statute under which the railway company was organized; in that it was an attempt to deprive it of rights and privileges already conferred upon it.

APPLICATION for mandamus to compel the respondent to proceed and approve of the kind and pattern of poles to be used by the relator for the purpose of operating this road. Facts appear in opinion.

Montgomery & Bundy, for relator.

Wm. Wisner Taylor (Smiley & Earle, of counsel), for respondent.

LONG, J.: The relator is a corporation organized under chapter 95, How. Stat., which provides for the organization of street railway companies.

Section 13 of the act provides that such railway company organized under the provisions of the act may, with the consent of the corporate authorities of the city given in and by an ordinance duly enacted for that purpose, and under such rules, regulations, and conditions as in and by such ordinance shall be prescribed:

Construct, use, maintain and own a street railway for the transportation of passengers, * * * but no such railway company shall construct

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any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use such streets.

Section 14 of that chapter is as follows :

After any city, village or township shall have consented, as in this act provided, to the construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred.

The relator sets forth in the petition that, on October 24, 1889, an ordinance was granted by the common council of the city of Grand Rapids to Samuel Mather and others, and their associates, to be afterwards organized into a body corporate, authorizing them to maintain and use street railways in certain streets in the city of Grand Rapids ; that the corporation was organized and the ordinance accepted by the corporation, and that the company was organized to operate a street railway system already constructed in the main, constituting various lines of street railway in said city, having definite termini, and that cars had been run over said routes for a long time, under definite authority by ordinance granting permission to the Street Railway Company of Grand Rapids, to whose rights the relator had succeeded ; that on December 16, 1889, another ordinance was granted to the same parties, authorizing them to maintain street railways in other streets of the city, which ordinance has been accepted by the relator, and the rights granted in this ordinance have also been assigned to relator. It is further claimed by relator that in each of said ordinances, by sections 5, 7 and 15, it is provided as follows :

Section 5. The cars to be used on said railway shall be drawn by electricity, or such motive power as may seem best to same company, and permission and authority are hereby given to said grantees and their assigns to place and erect in the streets of said city, on either side thereof, wherever their street railway tracks are constructed, suitable poles for suspending electric wires through and over said streets, the kind and pattern thereof to be approved by the common council of said city before the same are

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erected ; to place in and over said streets wires and cables for the purpose of conducting electricity thereon, suitable and necessary insulating appliances, and suspension wires or cables.

Section 7. The rate of fare on said railway shall be determined by said company, and shall not exceed five cents for each passenger on any car from its starting-point to the terminus of its route, and satchels in the possession of passengers shall be carried free of charge : Provided, that for extra cars, specially chartered, the said grantees may fix the rate of fare.

Section 18. It is hereby reserved to the common council of said city the right to make such further rules, orders and regulations as may, from time to time, be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railway, and the streets through which it passes.

It is further set forth in the relator's petition that in July last it petitioned the common council to approve of the kind and pattern of poles to be used in its system, and submitted plans to the council ; that the subject was referred to the committee on streets, which committee reported that they, after carefully examining the proposed poles, recommended for adoption and approval of the common council the following :

1. Iron poles, to be the E. P. Morris poles, or an iron pole of the same dimensions, and substantially like said E. P. Morris poles, and all of equally good workmanship, finish and style.
2. For the wooden poles the octagonal red pine pole, as manufactured by Browlee & Co., or a wooden pole substantially like said Browlee & Co.'s pole as to material, dimensions, style and finish, etc.

That on July 20, 1890, the committee made a further report, in which it was recommended that the fire limits of said city, as now constituted, be designated as the district wherein iron poles only should be used, and that iron or wooden poles could be used in all parts of the city outside of the fire limits, at the option of the railway company ; and that on July 28 said report was amended by adding the following thereto :

And in consideration of granting said street railway company the privilege of erecting said wooden poles in certain public streets of the city, said company shall be required to furnish its patrons, through its conductors, drivers or agents on or in charge of their several street railway cars, without additional cost, transfer tickets on the following named lines, namely : Cherry street and Eighth ward line ; West Bridge street and Ionia

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line; Wealthy avenue and Scribner street line; passengers to be, on demand, furnished with transfer tickets good on the so-called Hall street and Plainfield avenue line, and said Hall street and Plainfield avenue line passengers to be, on demand, furnished with transfer tickets good on the above enumerated lines, namely: Cherry street and Eighth ward line; West Bridge street and Ionia line; Wealthy avenue and Scribner street line. And thereupon said report of said committee was by said common council adopted.

The petition sets forth further, in substance, that on August 18, 1890, and on September 28, 1890, the railway company asked the council to approve of the kind and pattern of pole to be used in the construction of the railway line, and that the common council have taken no action thereon.

The respondent makes a return in which it admits the making of such ordinances, the organization of the relator as a corporation, and that the ordinances are correctly set forth in the relator's petition. It is claimed, however, that no definite and various lines of street railway having definite termini were established, but the right was given to the street railway company to operate a street railway over the streets theretofore occupied by several street railway companies, as one route, and nowhere in said ordinances were various routes having different termini fixed or specified, but that the entire system constituted the one route.

It is claimed, on the part of the relator, that the condition annexed by the common council to the permission to erect wooden poles in all parts of the city outside the fire limits, as adopted by the council on July 28, 1890, is invalid and beyond the power of the council to prescribe; that the action of the council shows that it is not necessary to erect iron poles outside such fire limits, but the conditions upon which the relator is permitted to erect the wooden poles in such territory is an effort on the part of the city to drive a bargain with the relator, and compel it to accept this condition in consideration of the common council doing precisely what it had already agreed to do by its ordinance, and what it was bound to do; that is, to fix the kind and pattern of poles to be used. The prayer

of the relator is that the common council be required to proceed to approve of the kind and pattern of poles to be used by the relator for the purpose of operating its road under the right granted it by the ordinances.

We are satisfied from an examination of the ordinances :

1. That by section 5 it was the duty of the common council to fix and determine the kind and pattern of poles to be erected and used by the relator.

2. That the common council have so fixed and determined the kind and pattern of such poles by its resolution of July 28, 1890, that is, iron poles within the fire limits of said city and wooden or iron poles outside of said fire limits.

3. That the condition attached to the use of wooden poles outside of such fire limits is wholly inoperative and void, and beyond the power of the council to prescribe. This condition is in direct conflict with section 14, chap. 95, How. Stat., and is an attempt to deprive the relator of the rights and privileges conferred by the ordinances thereto adopted, and the terms of which it is conceded the relator had duly accepted.

As the council has already done what the relator prays it may be compelled to do, the writ of mandamus must be denied.

CHAMPLIN, C. J., and GRANT, J., concurred with LONG, J.

CAHILL, J.: I think the common council has a right, under the powers reserved in the ordinance, to impose the conditions which it has sought to impose upon the relator as a condition precedent to its approval of the kind of poles to be erected. Neither do I think that the resolution as passed, with the condition annexed, can be treated as though passed without it on the theory that such condition is void.

MORSE, J., concurred with CAHILL, J.

NOTE.—Upon the same ground, to wit, of prior statutory authority, it was held in *Wisconsin Teleph. Co. v. Oshkosh*, 1 Am. Elec. Cas. 687, that a municipal corporation could not impose a license tax upon telephone companies as a condition of maintaining lines in streets.

See note to *Electric Improvement Co. v. San Francisco*, post.

CROWDER ET AL. v. THE TOWN OF SULLIVAN ET AL.*Indiana Supreme Court, June 18, 1891.*

(128 Ind. 496.)

ELECTRIC LIGHT COMPANY.—WIRES IN STREETS.—LICENSE

An ordinance which merely permits an electric light company to use the streets of a municipal corporation, without granting any exclusive privilege, is valid.

APPEAL from Circuit Court, Sullivan county.

J. M. Humphreys, T. Wolfe, J. T. Beasley, A. B. Williams and F. H. Kelley, for appellants.

G. W. Buff, J. S. Hays, and J. T. Hays, for appellees.

ELLIOTT, J.: The object of this suit is to enjoin the officers of the town of Sullivan from paying to the Sullivan Electric Light & Power Company compensation for furnishing the town and citizens with light. The theory upon which the complaint is constructed is, that the contract with the company and the ordinance on which it is founded are void. * * *

It is unquestionably true that a municipal corporation can not grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation or its citizens with light, water, fuel or the like. *Indianapolis, etc. R. R. Co. v. Citizens, etc. R. R. Co.*, 127 Ind. 369; *Citizens, etc. Co. v. Town of Elwood*, 114 Ind. 332. See authorities cited, note 2, Elliott Roads & Streets, 332. If the ordinance before us is to be construed as granting an exclusive privilege, it must be adjudged void, in so far, at least, as it attempts to make

such a grant. We are, however, quite well satisfied that the ordinance does not attempt to grant an exclusive privilege. It does, it is true, grant the right to use the streets of the town, but it does not exclude their use by competing companies. It does not throttle competition, for it merely grants a license to use the streets. It can not be held that permission to one company to use the streets excludes others. On the contrary, the grant of such a license leaves plenary power in the municipality to grant licenses to rival companies at any time. A licensee who obtains a right to use public streets does not obtain a monopoly. The right to grant other licenses remains open and unobstructed. Not only does the right to license other companies remain open, but the right to prescribe reasonable police regulations by a general ordinance also remains unimpaired. This is the effect of the decision in *Citizens, etc. Co. v. Town of Elwood, supra*.

A private corporation that obtains a license to use the streets of a municipality takes it subject to the power of the municipality to enact a general ordinance; for a governmental power, such as that exercised in enacting police regulations, cannot be surrendered or bartered away, even by express contract. But there is here no attempt to surrender or barter away this governmental power, for there is nothing more than a license to use the streets of the town. The decision in the case of *Citizens, etc. Co. v. Town of Elwood, supra*, was made upon an ordinance assuming to make a discrimination in favor of one company, and thus exclude all others from using the streets of the town for supplying the citizens with fuel; and it can not be regarded as denying the right to grant a license to a designated company, although it does deny the power to discriminate in favor of one company to the detriment of competing companies. Where a municipality attempts to regulate the mode of using its streets, it must do so by a general ordinance; but it does not follow that a general ordinance is essential to the validity of a license granted to a designated company. It is one thing to specifically license a corpora

tion to lay pipes in a street or construct electric lines, and quite another to regulate the entire subject of supplying light, fuel, or the like; for, where the municipal authorities assume to legislate upon the entire subject, a general ordinance is required; but where they simply grant a privilege to use the streets, and do not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. But neither by a general ordinance nor by special license can discriminations be made or monopolistic privileges be created. It is, however, often true that a privilege is in its nature monopolistic, and as shown in the case of *Indianapolis, etc. Co. v. Citizens, etc. Co.*, *supra*, when this is so the grant of the privilege is of necessity the grant of monopolistic rights; but in such a case the corporate grant does not create the monopoly. See authorities cited, notes 1, 2 and 3, *Elliott Roads & Streets*, 587.

In this instance there is nothing more than the grant of a license. There is no attempt to create exclusive privileges, nor any attempt to regulate the entire subject. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality; for no licensee can acquire rights not subject to regulation under the police power delegated to the local governmental instrumentalities. We have here no question of contract rights, for the question presented by the record is whether a special ordinance granting a permissive license to a delegated corporation is effective.

Judgment affirmed.

NOTE.—See note to *Electric Improvement Co. v. San Francisco*, *post*.

**HAUSS ELECTRIC LIGHTING POWER COMPANY V. THE
JONES BROS. ELECTRIC COMPANY.**

Superior Court of Cincinnati, Feb., 1890.

(28 Weekly Law Bulletin, Ohio, 187.)

**POLES AND WIRES IN STREETS.—CONCURRENT CONTROL BY COURT AND
MUNICIPALITY.**

There being concurrent power in the Probate Court and in municipal authorities to permit and regulate the use of streets by electrical companies, held that certain ordinances and regulations of the common council and board of public affairs of a city, permitting electrical companies obtaining later franchises to use poles already erected by earlier companies, applied only to poles (of earlier companies) authorized by the municipality; and that permission to use those authorized by the Probate Court could be obtained only as prescribed by the decree of the Probate Court granting permission to such earlier companies to use the streets.

A. L. Herlinger, Drausin Wulsin and Champion & Williams, for plaintiff.

Pottenger & Pogue and Paxton & Warrington, for defendants.

TAFT, J.: This is a motion to dissolve an injunction issued on the filing of the plaintiff's petition. The plaintiff company, which is authorized to occupy the streets of Cincinnati by a decree of the Probate Court, has, with the permission of the board of public affairs, erected poles for its use on the north side of Seventh, between Main and Walnut streets, and on the south side of the same street between Walnut and Vine. The defendant company wishing to use the same street, and being prevented by ordinance and its own decree in Probate Court from erecting poles on the other side of the street from that occupied by

the plaintiff, proposes to string its wires on the plaintiff's poles, and to pay a just proportion of the original cost of the poles, and a fair monthly rental. This the plaintiff denies the defendant's right to do and has obtained herein a preliminary injunction to prevent it from doing. The decree of the Probate Court under which plaintiff's company acts contains the following: "It is hereby further ordered that this decree shall not be so construed as to prevent the defendant city, or the court, from granting upon the same terms and conditions herein stated, to any other person, company or corporation proposing in good faith to engage in the business of supplying electric light or power within the same territory, the right to use the unoccupied portion of the poles, masts, towers, brackets or supports erected by said plaintiff company, upon the payment to the said plaintiff company of a fair proportion of the original cost of erection, and a monthly rental equivalent to a fair proportion of the cost of maintenance of the same, provided said unoccupied portion of such poles, masts, towers, brackets or supports is not required for the present as well as fair prospective business of said company, and provided further that such use does in no wise interfere either with the safe or successful use of the same by said plaintiff company.

"The exact location and the erection of all poles, masts, towers or supports proposed to be erected by said plaintiff company, shall be subject to the approval of the board of public affairs of the said defendant city, which shall, for good cause, have the right to order and enforce a change of location of any poles, masts, towers or supports; and the occupation by the said plaintiff of any new street hereafter opened, shall be upon a plan to be submitted by plaintiff company and approved by the board of public affairs of said city." It is also provided "that all poles, masts, towers, brackets or supports shall be 30 feet in height, unless otherwise specially ordered by the board of public affairs of said city."

This decree was entered March 8. 1889

On the 27th of July the board of public affairs adopted a series of rules for the construction of the outside plant for electric light and power. Section 33 of those rules provides that "in granting permits to erect poles for purpose of electric light or power, this board reserves the right, if the interests of the city so demand, to authorize other companies or persons to use the same poles for the same purposes upon the payment to the owner thereof of a proper compensation, to be determined by agreement between the parties concerned, or by the board in default of such agreement. All permits will be subject to this condition, and in accepting a permit the applicant binds himself according thereto."

On the 18th of October, 1889, the common council of Cincinnati passed an ordinance providing that whenever permission is by ordinance granted to any person, company or corporation to engage in the business of electrical illumination, it shall be under the following expressed terms and conditions. Among such terms and conditions is the following provision: "That the person, company or corporation erecting any such lines of poles, masts, towers or supports shall, upon payment to them of a fair proportion of the original cost of erection of the portion to be so occupied and possessed, and a monthly rental equivalent to a fair proportion of the cost of erection and maintenance of the portion to be so occupied and possessed, permit any other person, company or corporation to occupy and possess equal rights and privileges thereon, if said poles have not already a full complement of wires — same to be determined by the city electrician.

And, whenever two or more persons, companies or corporations are supplying, or propose to supply, electricity for any purpose whatsoever within the same territory, they shall be required to jointly use and occupy the same poles, masts, towers or supports upon the conditions hereinbefore recited; and no wires or electrical conductors of any character or kind shall be maintained in any other manner than that herein provided."

Then follows a provision by which the board of public affairs is to have the right to change the location of any posts, etc., and making the erection of all posts subject to the approval of the board.

Plaintiff erected the poles in question before the rules of the board of public affairs were adopted. They have applied for and obtained permits to string wires upon these poles since the enactment of those rules. The electrician of the city files his affidavit stating that, in his opinion, the poles of the plaintiff are amply able to accommodate the lines of the defendant company, without interfering with the lines or the present or fair prospective business of said plaintiff company. This statement is denied by several officers of the plaintiff company and another interested person, the president of the Brush Company. The claim is also made in like affidavit for plaintiff that the defendant may proceed through this district by alleys. Section 2461, under which, together with section 3471a (84 Ohio L. 7), the Probate Court acts in granting authority to occupy the streets to electric companies, provides that the mode of use of the street shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree, * * * the Probate Court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley or public way, so as not to incommode the public in the use of the same.

Since the Legislature has invested the Probate Court with what is practically a franchise—granting power, a power to be exercised in all events and to be of concurrent effect with similar grants from the municipal authorities, it is exceedingly difficult to reconcile and adjust rights growing out of franchises from the different sources and to say how far general ordinances of the city affect grants of the Probate Court. This much is clear, however, that no ordinance of the common council which in its terms is not wide enough to include what may be called Probate Court companies, is to be applied to them. The general ordi-

nance from which I have quoted above only applies by its terms to cases where permission is by special ordinance granted to any person, company or corporation, and provides the mode of use of the streets by such person, company or corporation. This general ordinance seems to have been intended to subserve the same purpose with respect to such companies, that the Probate Court decree fulfils with respect to companies deriving their power from its statutory authority, *i. e.*, they each prescribe the mode of use of the streets. Much has been said as to the police power and its exercise. Regulation of the use of the streets by such companies is certainly an exercise of legislative police power, but the fallacy of the argument for the defendant, as it seems to me, is in failing to perceive that under section 3461 the Probate Court is itself exercising such power, it being taken for the purpose from the common council. It might be argued, therefore, that where the Probate Court has exercised such power, it is not for the common council to qualify, amend or interfere with its action. In the plaintiff's decree, however, the city is given power to make provision for the joint occupancy of poles, and if the city has done that, its action is as binding upon plaintiff as the terms of the decree. The general ordinance above quoted has no such effect because of its limited application referred to. Are the rules of the board of public affairs such action? I think not. The city in such matters acts by common council. That body is given control of the streets. The board of public affairs simply enforces the ordinances of council. Under plaintiff's decree, the board is to fix location of poles and change them, but it seems to me to be an act beyond its power so far as the probate companies are concerned, to impose a condition upon its fixing such location and granting permits, that the company shall agree to some rule as to joint occupancy of its poles with another company. It is thereby seeking to qualify and amend the mode of use prescribed by the Probate Court though not being authorized by the decree of that court to do so.

Light & Power Co. v. Board of Aldermen.

However advantageous it may be to have electric wires governed by a common plan, the law gives two tribunals the power to make such plans, and if they do not agree, then the law does not work well. I come, therefore, to the conclusion that the only provision by which plaintiff is governed with respect to joint occupancy of its poles, is that contained in the decree. That occupancy can not be had by another company except upon a grant from the city to such other company. I think I have shown that there is no such grant by the city to defendant, and there has been none by the court under the reservation of power to grant such right contained in the decree. It follows that defendant's only remedy is to apply to the city authorities or to the court for such grant, and then to act upon it. This conclusion makes it unnecessary for me to consider the issues of fact made by the affidavit of the city engineer and the officers of defendant.

Motion to dissolve injunction overruled.

NOTE.—See note to *Electric Improvement Co. v. San Francisco*, *post*.

SUBURBAN LIGHT & POWER COMPANY V. BOARD OF
ALDERMEN OF THE CITY OF BOSTON.

Massachusetts Supreme Judicial Court, Jan. 26, 1891.

(153 Mass. 200.)

ELECTRIC LIGHT COMPANIES.—MUNICIPAL CONTROL.—CONSTRUCTION OF
STATUTES.

Under statutes (1) permitting telegraph companies to erect and maintain their lines upon highways in such manner as not to incommode the public use; (2) providing that the authorities of a place through which telegraph lines are to pass *shall* make a written designation of locations and kind of poles and wires; and (3) a later statute extending the same provisions to electric lighting companies "so far as applicable."

Held, that the word "shall" is not mandatory, at least as to electric light companies; that a board of aldermen have discretionary power, even to the extent of withholding any designation whatever for electric light fixtures.

Case of this series cited in opinion: *Pierce v. Drew*, vol. 1, p. 571.

APPLICATION for mandamus to compel defendants to designate locations for electric light lines in streets, pursuant to statutes, the substance of which is given in the above head note. Further facts sufficiently appear in the opinion.

R. M. Morse, Jr., A. C. Burrage, and C. E. Hellier, for petitioner.

J. B. Richardson, for defendant.

Per CURIAM: The following opinion was written by Mr. Justice DEVENS, and, after his death, was approved as the opinion of the court by the justices who sat with him at the argument:

The second petition, which is the only one which need be considered, does not ask that the aldermen shall give any special location for posts, etc., to the petitioner, but that they shall specify in writing where, along the highways of the city in the direction indicated, it may locate "such number of posts as may be reasonably necessary to enable your petitioner properly to do its business, the kind of posts and the height at which, and the places where, the lines may be run." The petitioner's contention is that it is the duty of the board of aldermen to give it such a writing, and that, whatever the authority of the board may be as to details concerning the number of posts, their place of location or construction, and no matter what the difficulties may be in providing any location for its posts, such as will be necessary for its business, such a writing and specification must be given. The provisions of the statute are thus construed as mandatory on the board, and absolutely requiring it to provide for the location of the poles of the

company. The board having refused to do this by giving the petitioner leave to withdraw, the petitioner now asks that the board may be compelled by *mandamus* to give to it written specifications as above stated. Pub. St. c. 109, sections 2, 3.

The argument of the petitioner is founded upon the use of the word "shall" in section 3, Pub. St. c. 109, which, as it urges, is a term not admitting of any other construction than that some appropriate location must be provided for, and that the duty to do this is an imperative obligation; while the word "may," in statutes, has been construed as "shall" in many cases, and thus as imposing a positive duty, the word "shall" has not often been construed as "may," and as importing only a power or authority. But there is no reason, where the connection in which this word is used, or the relation into which it is put with other parts of the same statute indicate that such is its object, that it should not receive such a construction. That the power given to the aldermen of a city or the selectmen of a town in regard to the location of poles, etc., was one to be exercised in their discretion, and that the whole subject was committed to them by the statutes, seem to have been assumed in several cases. *Hill v. Commissioners*, 4 Gray, 414; *Young v. Yarmouth*, 9 Gray, 386; *Com. v. City of Boston*, 97 Mass. 555; *Pierce v. Drew*, 136 Mass. 75. In *Young v. Yarmouth*, Mr. Justice DEWEY, referring to St. 1849, c. 93, embodied so far as this question is concerned, in Pub. St. c. 109, section 3, remarks: "These provisions clearly indicate the selection of a legally constituted body to adjudicate upon this subject, with full powers to revise their doings and correct any errors which practical working of the first specification and arrangements as to the location of such posts may seem to require." However imperative the word "shall" in the third section might be if it stood alone, it must be construed with the same word as used in the second section, and as subordinate thereto. It is of higher importance that the ordinary use of the highways should not be interrupted that these companies should

enjoy the privileges they desire, and it is so deemed by the Legislature. Yet that it may sometimes be impossible that they can have locations in the direction they desire without this result, owing to the narrowness or other condition of the streets is obvious. In such a case as that the second section of Pub. St. c. 109, declares that the posts, wires, etc., "shall not incommode the public use of the highways or public roads;" the right on the part of telegraph companies to demand a location must yield to the higher public interest. In this connection it was said in *Pierce v. Drew, supra*: "No right is given these companies to use the highways at their own pleasure, or to compel in all cases, as the plaintiff suggests, locations therein to be given them by the municipal authorities. The second section of the statute is to be construed with the third section, and shows an intention that a legally constituted board shall determine not only where, but whether there can be, a location which shall not incommode the ordinary public ways, with full power to revise its doings and to correct any errors which the practical working of the arrangements may reveal." But if Pub. St. c. 109, sections 2, 3, should be construed as imperatively compelling the board of aldermen to grant some location for the posts of the telegraph lines from one town into and through another, it would not necessarily follow that such a construction must be given thereto in the location of posts for the use of an electric lighting company. This chapter (109) deals only with the subject of telegraph lines. Its provisions were extended to "lines for the transmission of electricity for the purpose of lighting" by chapter 221 of the acts of 1883, and chapter 398 of the acts of 1889, "so far as applicable." As this chapter 109 was originally enacted only with reference to telegraph companies, whose lines must often, if not always, pass from town to town, and run through different towns, if it were intended, as the plaintiff contends, that the officers of one of these towns should not have the power to defeat the operations and business of such corporations,

and that they should be compelled to grant some locations for the necessary posts, the same intention would not necessarily exist in reference to electric lighting companies, whose operations are usually confined to a single town, or a part of a single town, and are of local interest merely. The reason for an imperative construction, we think, ceases when these provisions of statute are made to apply, "so far as applicable," to the latter class of local companies, and the statutes should not then receive such a construction. It can not, we think, be inferred, as the plaintiff urges, that it was intended that it was not to be in the power of local boards to defeat the operation of electric lighting companies, the organization of which was authorized by statute. When we observe how many considerations, so far as the public is concerned, enter into the question whether the streets shall be used for electric lighting companies of a local character, the liabilities of the cities or towns which may be involved, the danger to their inhabitants and to travelers, the other demands for the use of the streets, the necessity or otherwise of any use of the streets by any such companies, the expenses which must be incurred, the character for responsibility of the particular company petitioning, it is not readily supposable that in regard to companies whose operations were confined to a single town all that was intended to be left to the board of aldermen or selectmen were questions of detail only. In both cases the entry must be, petition dismissed.

NOTE.—See note to *Electric Improvement Co. v. San Francisco*, post.

HENRY FARRELL v. THE WINCHESTER AVENUE RAILROAD COMPANY AND OTHERS.*Supreme Court of Errors of Connecticut, Sept. 12, 1891.*

(61 Connecticut, 127.)

ELECTRIC RAILWAY.—OVERHEAD WIRES.—LIMITATION OF CHARTER.

The charter of defendant, a street railroad company, authorized it "to locate, construct and operate such railroad with cars propelled by electricity, in any mode that does not involve the use of overhead wires." An earlier general statute empowered the authorities of any municipal corporation to authorize the use of "any improved motive power" except steam, upon street railroads.

Held, that the defendant's powers were limited by its charter, and the mayor and common council could not permit it to use overhead wires; the exception in the charter being equivalent to a positive prohibition.

ACTION for injunction restraining a street railroad company from using overhead electric wires, and the mayor and common council of New Haven from permitting such use.

Suit brought to the Superior Court in New Haven county, and reserved, on demurrers to the complaint, for the advice of this court. Facts stated in opinion.

G. W. Robinson and *W. Trumbull*, for the plaintiff.

C. T. Driscoll, for the mayor and common council of the city.

J. Sheldon and *T. H. Russell*, for the Winchester Avenue Railroad Company.

CARPENTER, J.: Section 3595 of the General Statutes reads as follows: "The use of any improved motive power for drawing passenger cars on any horse railroad other

than that furnished by locomotives, dummies or box engines used on steam railroads, may be permitted and regulated in any city by the mayor and common council, in any borough by the warden and burgesses, and in any part of a town not included in any city or borough, by the selectmen, subject to revocation by the authority granting the same and by a two-thirds vote of its members."

Section first of the defendant's charter (10 Special Laws, 1224) provides as follows: "Said company is hereby vested with all the powers and immunities which are or may be necessary to carry into effect the purposes and objects of this resolution, and said company is hereby authorized and empowered to locate, construct and operate such railroad with cars propelled by electricity, in any mode that does not involve the use of overhead wires, or by animal power, as they shall deem advisable, upon and along the following streets," etc., naming them and including Winchester avenue.

The complaint alleges that the defendant has petitioned the mayor and common council of the city of New Haven for permission to use cars propelled by electricity by means of overhead wires, that the mayor and common council are about to grant the petition, and that the operation of the road by such overhead wires will cause irreparable damage to the property of the petitioner. The relief prayed for is an injunction restraining the city from granting the petition and the railroad company from constructing or erecting any poles or wires for the purpose of operating its cars by means of overhead wires.

The complaint is demurred to, because—"1st. It does not allege that the defendant intends or threatens to use said overhead wires, or to erect poles for the same, without permission of the mayor and common council; and 2nd, that the mayor and common council have full power to permit such use by the defendant under the provision of section 3595 of the Revised statutes, and that such power is not taken away or affected in any way by the provisions of the charter of the defendant."

The city of New Haven, also a defendant, demurred to the complaint because it is empowered by section 3595 of the statutes to permit all horse railroad companies, including the Winchester Avenue Railroad Company, to use electricity by means of overhead wires, etc. The case is reserved for the advice of this court.

The case is argued on the briefs as though only a single question was presented by the court, namely, does the charter repeal section 3595 of the General Statutes so as to prevent its application to the Winchester Avenue Railroad Company? It does not seem to us that this is the whole question, or quite the proper one. The real question is not one of repeal, but what powers may the railroad company exercise under its charter? Not what may the mayor and council grant, but what may the railroad company take? The charter of the railroad company is the full measure of the powers which it possesses. It cannot lawfully exercise any others. In ordinary cases every corporation is just what the incorporating act has made it, and is capable of exerting its faculties only in the manner the act authorizes. That charter was granted subsequent to the enactment of the section in the General Statutes. It would have been competent to the Legislature to grant to that company the right to exercise other powers than such as by the quoted section could be granted by the mayor and common council of the city. It was equally within the power of the Legislature to forbid the company to use electricity in a way which, under other circumstances, might have been given by the mayor and council. Suppose the charter had contained express words of prohibition, as—"said company is forbidden to use electricity in any way that involves the use of overhead wires." It would be admitted that the mayor and council could not then confer upon the company the right to use electricity in that way. It cannot be claimed that the mayor and common council of a city could give to a corporation the right to exercise a power which the Legislature had expressly forbidden it to exercise.

But the exception in the charter of the right to use

electricity in any way that involved the use of overhead wires makes the legal effect of the charter precisely the same that it would have been had such express words of prohibition been contained in it. In all statutes granting powers to a corporation or to an individual or to a body, things not enumerated in the grant, or excepted out of it, are held to be as distinctly negative as though there were express words of negation. Endlich on Interpretation of Statutes, section 354; Sutherland on Statutes, section 327; Sedgwick on Statutory Construction, 354. Thus in *Durousseau v. The United States*, 6 Cranch. 307, a statute of the United States had conferred appellate jurisdiction on the Supreme Court in certain enumerated cases, and it was held that that statute implied a negative on the exercise of appellate powers by the Supreme Court in all cases not comprehended within the enumeration. The national banking act empowers a national bank "to carry on the business of banking, by loaning money on *personal* security." It was held in *Fowler v. Scully*, 72 Penn. St. 456, that this act prohibited the loaning of money on the security of real estate, and that a mortgage given to a national bank as security for money so loaned was void. To the same effect are *Page v. Allen*, 58 Penn. St. 338; *Fridley v. Bowen*, 8 Ill. 151; *Ex parte McCardle*, 7 Wall. 506. "In so far as the rights granted to corporations are destructive of or encroach upon public or common rights, they are undoubtedly to be construed most strongly against those setting them up and in favor of the State or the public; they are not to be extended beyond the express words in which they are given or their clear import; and what is not given in unequivocal terms is to be deemed as expressly withheld." Endlich on Interpretation of Statutes, section 354. See also *Sprague v. Birdsall*, 2 Cowen, 420; *Coolidge v. Williams*, 4 Mass. 145; *The People v. Broadway R. R. Co.*, 126 N. Y. 29; *City of New Haven v. Whitney*, 36 Conn. 373; *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 501. Construing the charter of the Winchester Avenue Railroad Company by

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these rules, it is apparant that it has no capacity to take the right to use electricity in any way that involves the use of overhead wires for the mayor and common council of the city of New Haven ; and that the injunction should be granted.

In this opinion the other judges concurred.

NOTE.—See note to next case.

ELECTRIC IMP. CO. V. CITY AND COUNTY OF SAN FRANCISCO.

Circuit Court, N. D. California, March 30, 1891.

(45 Fed. R. 598.)

MUNICIPAL CONTROL OF WIRES IN STREETS.—INJUNCTION.

It is within the police power of a municipal corporation to prohibit by ordinance the suspension of electric wires over or upon the roofs of buildings, on pain of fine and imprisonment ; and the municipal authorities will not be restrained by injunction from removing wires erected or maintained contrary to such ordinance.

ON motion for injunction.

An ordinance of the board of supervisors of San Francisco, January 25, 1890, was as follows :

Order No. 2163. Prohibiting the suspension of electric wires over or upon the roofs of buildings, etc. The people of the city and county of San Francisco do ordain as follows :

Section 1. It shall be unlawful for any person, company or corporation to run or suspend or stretch over or across or upon the top or roof, or any portion of the top or roof, of any building in the city and county of San Francisco, any wire used for the purpose of conducting electricity, or an electric current, or for any purpose whatsoever.

Sec. 2. It shall be unlawful for any person, company or corporation to keep or maintain over or across or upon the top or roof, or any portion of the top or roof, of any building in the city and county of San Francisco,

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any wire used for the purpose of conducting electricity or an electric current, or for any purpose whatsoever, for more than ten days after such person, company or corporation shall have received notice in writing, signed by the chief engineer of the fire department of said city and county, to remove the same; and each and every day subsequent to the ten days after such prescribed notice shall have been given, and maintenance or keeping of any wires hereinabove prohibited shall constitute a new and separate violation of this ordinance.

Sec. 3. It shall be unlawful for any person, company or corporation to attach to or suspend from or support upon any building in the city and county of San Francisco any wire used for the purpose of conducting electricity, unless the same be attached, suspended or supported for the purpose of supplying to the owner or the occupant of such building, or to the owner or occupant of some part thereof, electric light or electric power, or telephone or telegraph service.

Sec. 4. It shall be unlawful for any person, company or corporation to run or suspend or stretch, or keep or maintain, upon any pole or other support erected in or upon the streets, or in or upon any street, in the city and county of San Francisco, any electric light wire, or any wire used to conduct electricity, or an electric current, for the purpose of producing electric light or motive power, unless such person, company or corporation shall have heretofore obtained, or shall hereafter obtain, permission of the board of supervisors of said city and county so to do.

Sec. 5. The provisions of this ordinance shall not apply to any building occupied in his or its business, by any person, company or corporation engaged in selling or furnishing or supplying electric lights or electric power, or engaged in conducting or carrying on a telephone or telegraph business; nor shall they apply to any wire erected and used exclusively for fire alarm and city and county purposes.

Sec. 6. Any person violating any provision of this ordinance shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not more than six months, or by both fine and imprisonment.

Sec. 7. If any person, who has heretofore run or suspended or stretched, or who shall hereafter run or suspend or stretch, over or across or upon the top or roof, or any portion of the top or roof, of any building in the city and county of San Francisco, or shall hereafter keep or maintain any such wire over or across or upon the top or roof, or any portion of the top or roof, of any building in said city and county, shall fail to remove the same within ten days after the receipt of written notice to do so, signed by the chief engineer of the fire department of said city and county, then it shall be lawful for said chief engineer of the fire department, and he is hereby authorized and directed to cause such wire to be removed.

In attempted enforcement of such ordinance, the city and county of San Francisco, through David Scannell, chief

engineer of its fire department, notified the complainant to remove its wires suspended on numerous buildings in violation of the ordinance, under pain of prosecution. Whereupon complainant immediately sought the protection of the court against such interference with its business by bringing these suits, and it now asks for injunctions pending the hearing of the suits which it has instituted against said city and county, and against said David Scannell, the chief engineer of the fire department of said city and county, to restrain it and him from enforcing or proceeding under such ordinance.

Haggin & Van Ness and *George C. Gorham, Jr.*, for complainant.

Langhorne & Miller and *Estee, Wilson & McCutcheon*, for respondent.

Before SAWYER, Circuit Judge.

SAWYER, J.: Without discussing the question at large, I shall content myself with a brief announcement of my conclusions in this case. After a careful consideration of the questions involved, I am satisfied that "ordinance No. 2163, prohibiting the suspension of electric wires over or upon the roofs of buildings," etc., is a valid ordinance, passed within the legitimate police powers of the city, under the authority of the State. In *Bartmeyer v. Iowa*, 18 Wall. 138, Mr. Justice FIELD says that the dissenting judges in the *slaughter-house cases* "recognized the power of the State in its fullest extent (the police power), observing that it embraced all regulations affecting the health, good order, morals, peace and *safety of society*, and that all sorts of restrictions and burdens were imposed under it; and that when these were not in conflict with any constitutional prohibition or fundamental principles, they could not be successfully assailed in a judicial tribunal." So, in *Butchers' Union, etc. Co. v. Crescent City, etc. Co.*, 111 U. S. 747 (4 Sup. Ct. Rep. 652), the court, quoting from Chancellor KENT, says:

“Unwholesome trades, slaughter-houses, operations offensive to the senses, *the deposit of powder*, the application of steam power to propel cars, *the building of combustible materials*, and the burial of the dead, may all be interdicted by the law in the midst of dense population, on the general and rational principle that every person ought to use his property so as not to injure his neighbors; *and that private interests must be made subservient to the general interests of the community.*”

In *Barbier v. Connolly*, 113 U. S. 27 (5 Sup. Ct. Rep. 357,) and *Soon Hing v. Crowley*, 118 U. S. 703 (5 Sup. Ct. Rep. 730), the court distinctly hold, upon a much milder case of danger than this, *that the fourteenth amendment in no respect interferes with or limits the exercise of this police power.* The exercise of no other branch of this power is more important than that which protects, or seeks to protect, the public safety of a great city like San Francisco. That the stretching of these wires over buildings in the manner practiced, as shown by the evidence, no one, I think, can doubt after reading the affidavits, is extremely dangerous, both as bring liable to originate fires, and as obstructions to the extinguishment of fires otherwise originated. Indeed, the danger is a matter of common knowledge. We might almost as well require strict proof of the danger of storing gun powder, or dynamite, in, under, upon, or about our houses. Even if these wires can be so put up and insulated as to be safe, in the mode suggested by one of the complainant's witnesses, Prof. Kieth, it has not been done. The professor himself does not claim that they are now safe. The danger is of a character cognate to that of gunpowder. There is, doubtless, a difference in the degree of the danger, but the consequences are liable to be far more widespread and calamitous. Should a raging fire occur, originated by the electric current, or otherwise, these dangerous wires might so obstruct the efforts of the firemen to extinguish it, as to result in the destruction of the entire city. It is, certainly, competent under the police powers of the State, to suppress such dangerous

erections, in the interest of the common safety of the community. Who can say, in view of the constant and perpetual menace, that the provisions of this ordinance are unreasonable? Is it unreasonable because the remedy against the great public and private nuisance is prompt and efficient, when no other remedy is certain to be equally so? We know not how soon a calamity from this source may come upon us. It may be while we are litigating the question. If one should store a large quantity of gunpowder or dynamite among the buildings in the midst of the city, would a like remedy be deemed unreasonable or inadmissible, or void, as not being due process of law? The fact is, the gunpowder has no right to be there. It is a standing and dangerous menace to the neighborhood, which any one affected by the nuisance has a right to abate. And when it is so extended as to become a public menace and nuisance, the public officers, especially, when specifically authorized to do so, can lawfully abate it. And such a constant and continuous menace and nuisance, in a less degree perhaps, it is manifest, these wires erected as they appear to be, are. They have no more right to be there than gunpowder. The only wonder is that owners of buildings, in view of the recognized danger, will permit their use for such purposes. True, the supervisors can not make an article dangerous, by simply declaring it to be so, when, in fact, it is not. But the practice, as it now prevails, against which this ordinance is directed, is shown to be dangerous, and, we, ourselves, all know it to be so. There can be no successful disputing of the fact. The order is general and applicable to all. If it is not enforced as to all, it ought to be, and the chief of police declares his purpose to enforce it in all cases that come to his notice. I see no good reason to believe that it was passed for the purpose of discrimination in favor of another company, as claimed, or that it is intended to be so enforced. I do not think it violates any provisions of the national Constitution. I regret to be obliged, by this decision, to affect, so seriously, the interests of the enter-

prising parties who are endeavoring to supply our citizens with electricity for the various purposes to which it is now applied. But I can not decline to administer the law as I find it, for the safety and security of the lives and property of the citizens of San Francisco. In accordance with the conclusions which I have reached, an injunction must be denied, and it is so ordered.

NOTE.—Upon the power of municipal corporations to authorize and regulate the use of their streets for the purpose of maintaining electrical appliances, which is the principal subject of the decisions in the last six cases and the next following, see note at vol. 2, p. 175; also INDEX to this volume, title "*Poles and Wires in Streets: Municipal Control.*"

In *Jersey City & Bergen R. R. Co. v. Mayor and Aldermen of Jersey City*, 15 N. J. L. J., 109, Nov., 1891, it appeared that a statute authorized the operation of street railroads by electricity, upon obtaining the consent of the municipal authorities; that after obtaining such consent, the complainant erected in certain streets the apparatus necessary to operate the trolley system; that afterwards, at the urgent request of the board of aldermen, who then had charge of the streets, the company commenced to extend the electrical system into other streets; that while this work was in progress, and after the company had expended considerable money upon it, the management of the streets was transferred to a "board of street and water commissioners," who prevented the completion of the work, and passed an ordinance prohibiting such extension of the trolley system, except with its permission.

The Chancellor, being of opinion that the street railway company, complainant, "by reason of the ordinance and resolution of the board of aldermen aforesaid, and its action upon the faith thereof, in preparing apparatus and expending money, secured the legal right to introduce said system of locomotion in Montgomery street, which could not be taken away, and was not taken away by the action of the board of street and water commissioners, and further, that the complainant is entitled to the assistance of this court in the exercise of its aforesaid right, provided that such exercise may be had with due regard to the public rights and convenience, and that this court should protect it in the enjoyment of its rights upon its undertaking to exercise the same in manner indicated," granted an order for the municipal authorities to show cause why the company should not be allowed to exercise its right to erect and maintain the trolley system.

UNITED STATES ILLUMINATING COMPANY, Respondent, v.
HUGH J. GRANT, as Mayor of the City of New York,
and others, Appellants.

THE BRUSH ELECTRIC ILLUMINATING COMPANY, Respond-
ent, v. THE SAME.

THE MOUNT MORRIS ELECTRIC LIGHT COMPANY, Respond-
ent, v. THE SAME.

N. Y. Supreme Court, General Term, First Department, Dec., 1889.

(55 Hun, 222.)

**DANGEROUS ELECTRIC LIGHT WIRES.—NUISANCE.—POWER OF REMOVAL.—
NEW YORK SUBWAYS ACTS.**

Even if the board of electrical control of the city of New York had refused permission to certain electric light companies for whose use subways had not yet been provided (as specified in the statute creating the board), to make such repairs as were necessary to keep their plant in a perfect and safe condition, without which permission said companies were by statute prohibited from making such repairs, such refusal would not excuse the company for their failure to make such repairs, until they had exhausted their legal remedy against the board to compel them to give the requisite permission.

The commissioner of public works of said city, either by virtue of his office, or as a private citizen, has a right summarily to remove a public nuisance existing in the street, dangerous to the lives of citizens, *e. g.*, uninsulated electric light wires, without first going to the creator of the nuisance and informing him of the discovery of its existence and requesting him to abate the same, and thereafter waiting, before proceeding to protect the lives of the citizens, for some indefinite length of time, called a reasonable time, in order to see whether the creator of the nuisance will not abate it.

Although another department or agency of the city government, *e. g.*, the board of health, had a concurrent right and duty to remove wires dangerous to the public safety, such right was not exclusive.

Chiefly for the reasons above given, though incidentally the statutes known as the New York subways acts were considered somewhat at length, orders continuing temporary injunctions restraining the board of electrical control and the commissioner of public works of New York city

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from interfering with the plaintiffs' overhead wires during the pendency of an action for permanent injunction, were reversed.

Cases of this series cited in opinion : *People v. Squire*, vol. 2, p. 176 ; *U. S. Illum. Co. v. Hess*, vol. 2, p. 187 ; *W. U. Tel. Co. v. Mayor of New York*, vol. 2, p. 195 ; *East River Elec. Light Co. v. Grant*, *post*.

APPEAL by defendants, the mayor, the commissioner of public works and the board of electrical control of the city of New York, from orders granted at Special Term, decreeing the continuance, during the pendency of the action, which was for a permanent injunction, of an order enjoining the defendants from removing or preventing repairs to or the replacing of plaintiffs' poles or wires, except where suitable subways should have been provided and notice thereof given as prescribed by statute, without first notifying the plaintiffs of particular defects in poles or wires. Facts stated in opinion.

John M. Bowers and *David J. Dean*, for the appellants.

James C. Carter, *Joseph H. Choate* and *Charles E. Hughes*, for the respondents.

VAN BRUNT, P. J.: The circumstances relating to the organization of the United States Illuminating Company and the Brush Electric Illuminating Company are so similar that it is not necessary, in the statement of facts, to refer distinctly to those two plaintiffs. The Mount Morris Electric Light Company stands in a different position in some respects, which will be hereafter noticed. The two plaintiffs first above mentioned seem to have been organized, pursuant to the laws of this State, for the purpose of generating and distributing through New York city electric currents for light and power. They were authorized to erect and maintain wires, poles and other fixtures incidental to their business, over and upon the streets of the city, upon obtaining the consent of the municipal authorities. This consent was given by resolution of the common council ; and pursuant to this authority a large

amount of money has been invested in the business for the prosecution of which these companies were organized, and poles have been erected and wires strung by virtue of their charters, and with the permission and under the protection of the municipal authorities. In 1884 the first act of the Legislature (chapter 354) was passed, looking to a suppression of the evil, which had been recognized, of allowing telephonic and electrical companies to occupy those parts of the streets which are above ground for their poles and wires. By this act it was provided that all telegraphic, telephonic and electric-light wires and cables used in any incorporated city of this State, having a population of 500,000 or over, should thereafter be placed under the surface of the streets and avenues of said cities, and that this should take place on or before the 1st day of November, 1885. And it was further provided that in case the owners of the property should fail to comply with the provisions of the act, the local governments of said cities were directed to remove without delay all telegraphic, electric light and other wires, cables and poles, wherever found above ground, within the corporate limits of said cities.

Compliance with this act having been recognized as an impossibility, in 1885 another act was passed, entitled "An act providing for placing electrical conductors under ground in the cities of this State, and for commissioners of electrical subways." Laws 1885, chap. 499. By this act, within twenty days after the passage thereof, in cities having a population exceeding one million according to the last census, the mayor, comptroller and commissioner of public works of such cities were authorized and directed to appoint three disinterested persons, residents of the respective cities for which they shall be appointed, to be a board of commissioners of electrical subways. This board was charged with the responsibility of enforcing the provisions of the act hereinbefore mentioned, and the act of 1884 was amended so as to conform in all respects to the provisions of the act of 1885.

By the act of 1885, it was made the duty of the subway
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commissioners to cause to be removed from the surface and to be put, maintained, and operated underground, wherever practical, all electric wires or cables used in the business of any electrical company. Provision was also made for such companies constructing conduits under ground, after approval of their plans by the board of subways. It was further provided that said subway board should carefully investigate any and all methods proposed by any such company. It further provided that if no suitable plan was proposed or in use within sixty days after the passage of the act, it should be the duty of the board to cause to be devised and made ready for use such a general plan as would meet the requirements of said acts, and that the board should have full authority to compel all companies operating electric wires to use the subways so prepared. In the suburbs, or along the streets, avenues or other highways, in sparsely inhabited or unoccupied portions of any such city, the public interests not requiring the electrical conductors to be placed under ground, and wherever, in any other locality in any such city, it was deemed by said board to be for any cause impracticable to construct and successfully operate underground the electrical conductors required by any such company, it should be the duty of said board to examine and grant the application of any such company for permission to deviate from an underground system; but the board should not grant any such permission, unless satisfied, upon such investigation, that such a permission should, for one or the other reasons thereinbefore stated, be granted, and that it would not interfere with the successful working of underground conductors elsewhere in said city. It was provided that such permit should be held and construed to authorize the construction and maintenance of the lines of conductors therein provided for as and where prescribed by the board. It was also made the duty of the board, in granting such permits, to bear in mind the purpose and policy of the act, which was to convert the overhead systems in use in said cities, to underground systems as

soon as possible, without impairing the efficiency of their service.

The act further provided that the work of constructing every line of conductors authorized by any such permit should be subject to the rules and regulations, not inconsistent therewith, prescribed, or to be prescribed, by the local authorities having control of the streets, avenues, or other highways in such city; and that every such permit should specify the location of the structures to be erected and used for sustaining the electrical conductors, and should give the general dimensions thereof. The act further provided, by section 5, that whenever said commissioners, in carrying out the provisions of the act, should permit any aerial electrical wires or cables to be erected, it should be the duty of the board to designate in such permit the route and location thereof, and to prescribe and regulate the height at which such wires or cables should be placed, and that all such wires and cables should be so erected and maintained as not to incommode the other public uses of such streets, avenues, or highways. In 1886 an act was passed, amending the act of 1885 in particulars which it is not necessary to mention here.

In 1887, another act was passed, entitled "An act in relation to electrical conductors in the city of New York" (Laws of 1887, chap. 716), by which, after its passage, the board of commissioners of electrical subways in and for the city of New York, heretofore appointed, together with the mayor of said city for the time being, were constituted a board of electrical control in and for the city of New York, and upon this board were conferred all the powers and duties imposed by the act of 1885 upon the commissioners appointed thereunder and all the powers and duties therefore by any law conferred or imposed upon the local authorities of said cities, or any of them, in respect to or affecting the placing, erecting, construction, suspension, maintenance, use, regulation, or control of any electrical conductors or conduits or subways for electrical conductors in said cities; and it was provided that such powers should

thereafter be exclusively exercised or performed by said board of electrical control.

By the third section, it was provided that whenever, in the opinion of the board, in any street or locality of any city, a sufficient construction of conduits or subways under ground should be made ready, under the provisions of the act, it should notify the owners of the electrical conductors above ground in such street or locality to make such electrical connections in said street, or through other streets, localities, or parts of the city, with such underground conduits, or subways, and to remove poles, wires, etc., above ground, and their supporting fixtures or other devices, within ninety days after notice to such effect should be given. This provision was made a police regulation in and for the city of New York; and, in case it was not complied with, it was made the duty of the commissioner of public works to cause the same to be removed forthwith by the bureau of incumbrances, upon the written order of the mayor of said city to that effect.

The fourth section is as follows:

Section 4. It shall be unlawful, after the passage of this act, for any corporation or individual to take up the pavements of the streets of said city, or to excavate in any of said streets, for the purpose of laying under ground any electrical conductors, unless a permit, in writing, therefor shall have been first obtained from said board or its predecessors; and except with such permission, no electrical conductors, poles, or other figures or devices therefor, nor any wires, shall hereafter be continued, constructed, erected, or maintained or strung above ground in any part of said city. The said board of electrical control may establish, and from time to time may alter, add to, or amend all proper and necessary rules, regulations, and provisions for the manner of use and management of the electrical conductors, and of the conduits or subways therefor, constructed or contemplated under the provisions of this act, or of any act herein mentioned.

Pursuant to the authority thus conferred, certain subways in this city have been constructed; but sufficient subways for the operating of the underground wires of the two plaintiffs' companies above mentioned have not been constructed or provided for their use, and they have

not been permitted to construct the same upon plans of their own. Under the authority conferred by the acts above mentioned, the plaintiff, the Mount Morris Electric Light company, has constructed its plant, pursuant to the rules and regulations, and under the supervision, of the board of electrical control. Various accidents having occurred, the attention of the board and the city authorities was called to the condition of the electric wires which were being used by those companies; and, it being found that many of these wires were dangerous, because of their want of proper insulation, the board of electrical control, on the 9th of October, 1889, passed the following resolution:

Resolved, That notice be given to all companies operating and furnishing electric lights on overhead wires in the city of New York to discontinue the use of such overhead wires as are not properly insulated until such time as said wires shall be certified by an expert of this board to be in proper and safe condition.

The companies plaintiff were a day or two thereafter notified to shut off the electric currents from their wires, and on the twelfth of October the mayor issued a direction to the commissioner of public works in the following language:

SIR: You are hereby directed to remove all the electric light wires in the city of New York which are at this date improperly insulated, and which are now in position, in violation of the rules and regulations of the board of electrical control. The wires to be removed under this order to be designated by the expert of the board.

Subsequent to the receipt of this order the commissioner of public works proceeded to take down wires claimed to be imperfectly insulated, and therefore dangerous to human life. It is claimed upon the part of the plaintiffs that said commissioner, in the carrying out of this work, not only removed wires where there was a break in the insulation, but also a number of blocks of wires all of which were of good quality, proper insulation, and in perfect condition; and that he threatened on the following morning to take

down the remaining connecting wires, although in a state of perfect insulation.

The plaintiffs, claiming that the condition of their wires was due solely to the arbitrary and unjust refusal of the board of electrical control to permit the plaintiffs to repair the same, without which permit such repairs could not be made, and that their rights of property were in jeopardy, and that the public authorities had no power to interfere with the conduct of their business in the manner in which it was proposed to do, obtained and served the temporary injunction granted herein. Upon argument, this injunction was made permanent, to the extent that the board of electrical control were restrained and enjoined,

From removing, or causing to be removed, any of the poles or overhead wires or fixtures of the plaintiff in this city, except in the parts of said city where suitable underground subways or conduits for the suitable reception of the overhead wires of plaintiff have been provided and made ready for the occupancy of plaintiff, and notice thereof given to said plaintiff as required by the statute in such case made and provided; and, except where such underground subways or conduits have been provided as aforesaid, from preventing repairs of any of the poles or overhead wires and fixtures of the plaintiff, or the replacing of such poles or wires or fixtures as may be defective by proper poles or wires or fixtures; and from ordering plaintiff to discontinue the use of its overhead wires, or any of them, except wires defectively insulated, and then only until such wires have been properly insulated, or replaced by wires properly insulated.

And the defendant, the commissioner of public works, was enjoined and restrained from removing, or causing to be removed, any of these poles, wires, or fixtures, except where suitable subways had been provided, and notice thereof given, without first giving the plaintiffs written notice, specifying in detail, the particular wires, or parts of wires, defectively insulated, or for other cause needing repairs or replacement, or the particular poles or fixtures needing repairs or replacement, and giving to plaintiffs reasonable time to repair and replace the same; and only upon the default of the plaintiffs to make such repairs or replacement after such reasonable time had elapsed after the giving of such notice.

From such order this appeal is taken. It seems to us that but two questions are presented by this appeal, and they are :

First, even if the board of electrical control in those cases where subways have not been provided, have refused permission to these plaintiffs to make such repairs as were necessary to keep their plant in a perfect and safe condition, will such refusal excuse the plaintiffs for their failure so to do? and, *secondly*, has the commissioner of public works the power to abate a public nuisance existing in the streets of the city of New York, dangerous to the lives of its citizens, without first going to the creator of the nuisance and informing him of the discovery of its existence by the authorities, and requesting him to abate the same, and thereafter waiting, before proceeding to protect the lives of the citizens, for some indefinite length of time, called a reasonable time, in order to see whether the creator of the nuisance will abate the same or not?

That the latter is a proposition presented by this appeal seems to have been conceded by the learned counsel for the plaintiffs upon the argument, and also by the learned judge in the court below. It was admitted upon the argument that in the conduct of the business in which these plaintiffs are engaged the wires employed for the conducting of the currents used by them for the purpose of lighting and the furnishing of power, unless perfectly insulated, are dangerous to human life; and, without this admission, occurrences have taken place which demonstrate the proposition. The plaintiffs, therefore, are conducting a business by means of an apparatus and a force which, unless properly controlled, subjects every passer-by in the streets of New York to the danger of death. They are, therefore, bound, in the prosecution of that business, to use the highest degree of diligence; and, if it is impossible for them to conduct their business without subjecting the passers-by upon the streets of the city to danger, although without negligence on their part, then it is doubtful whether the Legislature even could, without closing the

street as a public highway, and making provision for compensation to all parties damaged thereby, confer authority for the conduct of such a business upon the public streets of this city, because it would be giving up the streets to a purpose for which they had never been dedicated.

The proposition, then, which is presented, is (in view of the rule of law requiring the plaintiffs, because of the dangerous character of the business which they are conducting, to use the highest degree of diligence), when the plaintiffs have failed to comply with this obligation, and when human life is threatened because of this failure, have not the public authorities — or, for that matter, any citizen — the right to at once remove such danger, as a common nuisance? We think there can be but one answer to this proposition; and that under such circumstances the law allows this summary method of doing justice, because injuries of this kind require an immediate remedy, and can not wait for the slow progress of the ordinary forms of judicial procedure. In other words, human life is more sacred than the forms of legal procedure.

When it is apparent, as in the case at bar, that the condition of the wires of the plaintiff is such that they are dangerous to human life, and that any passer-by, without negligence on his part, is liable to be struck dead in the street, can it be said for a moment that the public authorities have no power to abate this nuisance, and protect the lives of its citizens? Indeed, it is one of their highest duties; and, if they allowed such a condition of affairs to continue, they might make the city itself liable for the damages sustained by reason of their negligence in not removing the common nuisance.

But it is said on the part of the plaintiffs that their large investment of capital is thus left to the mercy of the public authorities, and that they are at least entitled to some notice of the defects complained of in order that they may remove the same. This proposition involves a claim upon the part of these corporations that the public authorities shall perform a duty which the law devolves

upon themselves, namely, the proper inspection of their own apparatus, which is liable to become dangerous at any time, and the immediate remedying of the difficulty. It is not a part of the duty of the public authorities to inspect the apparatus of private corporations, and warn them when such apparatus becomes dangerous to human life.

There is one fact which seems to be established beyond question upon the papers before this court, and that is that at the time of the commencement of these actions the wires of these plaintiffs had become excessively dangerous by reason of defective insulation. Attention was called to this condition of affairs by the happening of accidents by which human life was sacrificed, and the great strife seems to have been, between the electrical companies and the board of electrical control, as to upon whom the blame for this shameful condition of affairs was to be imposed. The companies claim that the board refused arbitrarily to allow repairs to be made, which were requested by them, and that the rules and regulations of the board regulating these repairs were unreasonable, and that they were in consequence unable to keep their wires in that condition which their plain duty required should be done. But, even if this state of affairs existed, it was no excuse to the plaintiffs. They had ample remedies at their hand for the purpose of compelling the board of electrical control to give them permits for the making of repairs, if such permits were unjustly refused. The courts were open to them; and it is a familiar principle that where a permit upon the part of any of the city's officers is improperly refused, a *mandamus* may issue to compel the performance of that public duty. But these plaintiffs, when their wires got into such a condition, concededly, as made them public nuisances, endangering human life, made not the slightest effort to compel the board of electrical control, if they unjustly refused, to grant them permits to repair; and it is a very significant circumstance, when we take into consideration

the dispute that arose between the board of electrical control and the plaintiffs.

If these electrical companies had been actuated by the slightest desire to put their apparatus in a condition such as would not endanger human life, they could easily have found a way to remove the obstruction which they claim was placed in their path by the board of electrical control. It would seem that they were only too willing to attempt to shelter themselves behind the assumed unreasonableness of some of the regulations of the board, and to allow their apparatus to get into such a condition that it was dangerous to human life, and become a public nuisance.

In the determination of the question as to whether the commissioner of public works should have been enjoined in the removal of those wires which were not properly insulated, it is not necessary for us to consider or discuss this dispute. The mere fact that the board of electrical control refused permits to which the plaintiffs were entitled, forms no excuse for their allowing these wires to get in this condition, and remain so for the periods of time established by the papers before us.

There is no question but that if the operation of their system had depended upon the procuring of these permits to which they were entitled, the plaintiffs would have found ready means to call the board of electrical control to reason. But, by sheltering themselves under this, as they now claim, unauthorized action of the board, they undoubtedly thought themselves excused from the expenditures of money necessary to render their apparatus safe for operation. As has already been said, this formed no excuse for a longer time than would have been necessary to make an application to the courts to enforce their rights against the board of electrical control.

It should be observed that the complaint alleges that whatever disputes had arisen between the board of electrical control and the companies in respect to the making of repairs had been settled prior to the commencement of this action, and that the board had construed its rules so as

to allow the plaintiffs to take down old wires where this was deemed necessary, and replace them by new wires, protected by new insulation; and it further appears by the other papers that this occurred in August, 1889. The complaint further alleges that it was still uncertain whether said board would allow the new wires which are erected in place of the old ones taken down to be of larger size and greater conductivity than the wires which they replace. This, being new construction, was clearly a matter within the discretion of the board; and hence every question as to permits simply to repair had been resolved long before the commencement of this action. It further appears from the papers in this case that at the time of the commencement of these suits the wires of these companies were in a terrible condition, in respect to imperfect insulation, and that they were a menace upon all sides to the safety of the passer-by upon the public streets.

The commissioner of public works, under these circumstances, in view of his duty to remove obstructions from the streets, whether dangerous to the citizens or otherwise, had the duty devolved upon him to abate the nuisance at the earliest possible moment. It is true that in taking such action he undoubtedly did so at his peril; and, in an action brought against him for the violation of the property rights of any one of these companies, he would be bound to show such a condition of affairs as rendered the existence of the wires so removed a public nuisance. It is claimed upon the part of the plaintiffs that the commissioner of public works asserted the right to remove a whole line of wire because of a single defect. This, however, does not seem to be clearly established. He undoubtedly had no right to remove more than was necessary to abate the nuisance. But this right existed in the commissioner of public works, in common with any other citizen who desired to use the streets of the city.

It is undoubtedly true that no power other than that connected with his office was conferred upon the commissioner by the resolution of the board of electrical control, or

the direction upon the part of the mayor. The contingency had not arisen which authorized the board of electrical control, as a body, to put the commissioner of public works in motion, nor was the mayor authorized to confer any authority upon the commissioner in respect to this matter which he did not enjoy by virtue of his office. Therefore, in the consideration of this question it has not been deemed necessary to discuss the action of the board of electrical control or of the mayor. It has also been assumed that these plaintiffs have a right to continue and maintain overhead wires until the subways should be ready, provided such wires are maintained in such a manner as not to be dangerous to human life; and that they have a right, when such wires become out of repair, to repair the same, subject to the reasonable regulations of the board of electrical control; and that it is the duty of said board, if necessary, to give the plaintiff permission to do so.

The learned judge in the court below seems to have conceded these propositions, and said: "The plaintiff owes a duty to the public to keep its wires safe; and, if the board would not take the necessary action to enable it to remove dangerous wires and put up safe ones, it should have applied to the courts for relief. Under these circumstances, I think it was not only a proper and necessary regulation for the board to require the plaintiff to discontinue the use of such overhead wires as were not properly insulated, but that it was the plain duty of the board to make such regulation. Whoever may be responsible for the failure to supply subways, and whether the plaintiff is wholly or only partially responsible for the fact that its unsafe wires were not repaired, when it became apparent that human life was endangered by reason of the imperfect insulation of some of its wires, it was the right and duty of the board to direct the immediate discontinuance of the use of such wires. Nor do I think it was necessary to the validity of such action that the plaintiff should have had notice, and an opportunity to be heard and to remedy the defects, before the resolution was adopted. A wire carrying a heavy current of

electricity, and not properly insulated, is dangerous to life, and is a public nuisance; and I think the board had the right to direct the immediate discontinuance of such wires, without notice to the plaintiff. I am inclined to think, however, that the resolution which was adopted went too far, in providing that such discontinuance should continue until the expert of the board should certify that such wires were in a proper and safe condition. The plaintiff has no control over such expert; and it is possible that, for reasons satisfactory to himself, he might never give such a certificate, even if the wires were made perfectly safe."

It would thus appear that his judgment was founded upon the assumption that the commissioner of public works derived his authority to act from the board of electrical control and the mayor; and that the action of the commissioner should not be controlled by the opinion of the expert of the board of electrical control; and that the board had no power to compel the discontinuance of the wires until the expert should certify that such wires were in a safe and proper condition; and that the decision of the expert as to the want of safety of the wires would not necessarily justify the action of the commissioner.

In these latter propositions, we think the learned judge was clearly right. But the commissioner of public works had a right to act, both as a private citizen and by virtue of his office, and to remove these obstructions, which had become dangerous, without notice to the plaintiffs; and therefore the injunction which was granted was entirely too broad, in restraining all action upon the part of the commissioner of public works until the companies should have an opportunity to remedy the defects pointed out by him. Considerable has been said upon the argument, and is also contained in the brief of the counsel of one of the parties plaintiff, that the power to remove nuisances which had become dangerous to life is vested in another department of the city government.

It may be true that the board of health, under the peculiar phraseology of the act conferring powers upon them,

would have a right to remove these wires, because dangerous to human life. But their power was not exclusive. The department of public works had a right also, and it was its duty, to keep the streets of the city of New York in a passable condition, and to remove all obstructions which interfered with their use, and therefore had ample authority to abate this nuisance. If this was not so, will a court of equity intervene, by injunction, to restrain the abatement of a nuisance by the public authorities simply because the proper department is not acting? We think not. The nuisance existing, the court will not limit its abatement to any particular officer of the municipality, unless the exclusive power is plainly conferred upon one department. Even then, the right of an officer of the municipality to act as a private citizen, in a perfectly clear case, would not be affected.

The counsel for the respondents, while apparently conceding the right of the commissioner of public works to remove an imperfectly insulated wire, urges that the right of removal must in the first place depend upon a determination by the commissioner of the condition of the fixture, and this he has no right arbitrarily to determine without notice, and without affording the plaintiffs an opportunity to be heard; and, if the pole or wire is defective or unsafe, it should not be removed, or the nuisance abated, without granting to the plaintiff an opportunity to remedy the alleged defect. That the commissioner should not act arbitrarily, and without a determination as to the condition and existence of the nuisance, is undoubtedly correct; but where a party erects and maintains knowingly a public nuisance in the streets of New York necessarily dangerous to human life, we know of no rule of law which requires the public authorities, or the public, to abandon the streets until the party maintaining the nuisance shall have an opportunity to be heard as to its existence, and, after such hearing, an opportunity to remove the same.

In this proposition the learned counsel seems to us to overlook the important fact that it is because of the gross

negligence of the plaintiff that these wires were allowed to become a public nuisance, as they are conceded to have been at the time of the commencement of this action.

The plaintiffs have been guilty of a wilful violation of a manifest duty in allowing these wires to become dangerous. They are without excuse ; and when they claim that the destruction of these instruments of death, maintained by them in violation of every duty and obligation which they owe to the public, is an invasion of their rights of property, such claim seems to proceed upon the assumption that nothing has a right to exist except themselves. It is idle to say that a party knowingly maintaining a nuisance which may at any time deal death to innocent passers-by can for an instant be entitled to the protection of the law in its maintenance. If these plaintiffs had been without fault, a different question might have been presented. But it is evident that they were guilty of the highest degree of negligence. The commissioner had authority, both as a private citizen and as a public official charged by the duties of his office with the removal of obstructions from the streets of the city, to abate the nuisance complained of.

Some of the affidavits contained in the record appear to claim that the commissioner of public works, although not acting wantonly in his attempts to abate the existing nuisance, yet either had removed or threatened to remove, before the hearing of the motion in the court below, certain wires which were not in a defective condition. We have not deemed it necessary to advert to those claims, because the complaint, as filed, contains no averments under which proof of such facts would be admissible ; and, as the relief granted must depend upon the allegations of the complaint, no such question is presented for consideration.

It follows, therefore, that the order appealed from should be reversed, with ten dollars costs and disbursements.

BARRETT, J. : While concurring in the conclusion arrived at by the presiding justice, and also in what he has so forcibly said, there are one or two additional considerations which it may, perhaps, not be unprofitable to place

upon record. We start with the constitutionality of the act of 1885, deliberately settled by the Court of Appeals. *Squire's case*, 107 N. Y. 593. A careful comparison of that act with the act of 1887 shows no such divergence in the latter enactment as to render its constitutionality doubtful. This has been affirmed in several cases (*U. S. Illuminating Co. v. Hess*, 19 N. Y. State Rep. 883; and see *W. U. T. Co. v. Mayor*, 38 Fed. Rep. 552; and *East River Electric Light Co. v. Grant*, MSS. opinion, INGRAHAM, J.); and it cannot be doubted that if the act of 1887 had been before the Court of Appeals it would have received the same treatment as the act of 1885; for the principles enunciated by RUGER, Ch. J., in the *Squire case* (*supra*), are directly applicable to the provisions of the later enactment. It is true that a literal and strained construction of section 4 of the act of 1887 might subject some of its provisions to constitutional objection. The plaintiffs have undoubtedly acquired property rights and franchises of which they cannot be deprived without just compensation. They are duly incorporated, under legislative sanction. They have obtained the consent of the local authorities to their corporate use of the streets, and they have obtained this pursuant to legislative direction. Upon the faith of this authorization from the law-making power, they have expended large sums of money, and otherwise acted upon the legislative license. From this condition of things, two propositions flow: *First*, the license having been acted upon, and something done by the licensee in consideration thereof, it has become invested with the qualities of a contract: *second*, such of the companies' operations as may reasonably be said to have been contemplated by the Legislature cannot be deemed a nuisance. So far as the public is concerned, the legislative power within its constitutional limits, is substantially omnipotent. A proper construction of this fourth section, therefore, calls for the clear recognition of the cardinal considerations: *First*, that there can be no implication of a legislative intention to deprive the plaintiffs of their vested rights; *second*,

and, on the other hand, that there can be no implication of a legislative intention to authorize an inherent nuisance, not merely something which, but for legislative sanction, would constitute an illegal structure in the highway, but something essentially *malum in se*. Thus viewed, there is little difficulty in giving this section a reasonable and harmonious interpretation, just to the companies and not inimical to the public welfare. The companies are not organized under these later acts, which, indeed, have no relation to such corporate organization, but under an act passed at a time when the present methods of applying the electric principle were not in vogue, and were probably not even dreamed of. Laws 1848, chap. 265. *The acknowledged nuisance of non-insulated wires*, seemingly unavoidable at times in these modern systems, was not then contemplated, much less authorized; nor was any particular method of applying the electric principle referred to in either of the amendatory acts. Laws 1879, chap. 512; Laws 1882, chap. 73. We have been referred to no statute expressly authorizing the present methods of electric application for street illuminating purposes. On the contrary, the acts passed in and since 1884 indicate a legislative awakening to the fact that advantage was being taken of harmless general laws to incorporate for dangerous uses; and every one of these acts (1884, 1885, 1886 and 1887) speaks loudly of a growing disposition on the part of the Legislature to check the evil of such dangerous uses. The purpose of the act of 1887 was largely to reaffirm the previous determination, that all these dangerous appliances should be placed under ground, and, finally, to complete its execution. Until the subways were ready for their occupation, the companies were permitted to proceed with the business for which they were organized, by means of the existing over ground fixtures and apparatus. To maintain, until the completion of the subways, such existing fixtures, apparatus, and wires as were really safe and as were covered by due previous authorization, these companies were not bound to procure a fresh permit from the

new board of electrical control. But they could not supplement such fixtures, apparatus, or wires, nor otherwise add to their existing systems, without such a permit.

Nor could they continue even their existing systems, at any point where, owing to non-insulation or defective apparatus, their wires had or might become dangerous to the community; at least, until the apparatus had been rendered perfectly safe for the conduct of this intense electric agent. To that extent, and for the purpose in general of securing the public safety pending the construction of the subways, the Legislature conferred upon this board the power of granting or refusing permits. This power must, of course, be exercised reasonably; but, subject to this rule of reason, and especially in view of the general purpose referred to, it is necessarily continuous, and it involves the authority from time to time to revoke such permits, when public safety imperatively demands some modification of the deadly force or more perfect insulation or other safeguards. It is clear to my mind that in these particulars there is in this act of 1887 a valid exercise of the police power, and a valid delegation of such power to the board, and such is the true construction of the meaning and intent of the fourth section of that act. If, then, the plaintiffs' entire systems are necessarily and unavoidably dangerous to human life, as matter of fact, they can be restrained or abated by appropriate proceedings; for, so far as their mode of using electricity is thus dangerous to human life, it is without legislative authority, express or implied, and the systems, under such use, become nuisances. But the entire structure can not be summarily destroyed, if the particular nuisance can be otherwise restrained or abated. Where the offense consists in the wrongful use of what is harmless in itself, the remedy is to stop such use, not to tear down or remove the structure. *Moody v. Board of Supervisors*, 46 Barb. 665, 666, citing *Barclay v. Commonwealth*, 25 Penn. St. 503. If the entire system becomes, as a conclusive and openly apparent fact, so flagrantly and imminently dangerous to human life as to come within the

principles governing conflagrations and pestilence, the corporate authorities can doubtless summarily abate it. If, however, the systems are not necessarily and unavoidably dangerous to human life ; if they can be kept in a safe condition by active vigilance and proper repairs — they are permitted to continue until the subways are ready for their reception. In that case, however, while the entire system may not be a nuisance, each part of it which is suffered to become dangerous is *a nuisance*, and, as one of the learned counsel for the plaintiffs justly and candidly conceded upon the argument, “a nuisance of the highest kind.”

At this point we come to the practical question raised upon the motion below. Here let me say that my difference is not with Mr. Justice ANDREWS' opinion in the main, but with his order. That opinion is a careful, exhaustive, and generally accurate statement of the facts and the law. Indeed, I can not see that we reach this point by different roads. The learned judge concludes that non-insulated wires are nuisances, and that they should be promptly abated. But he thinks that before abatement by the public authorities the companies should have notice, and a reasonable opportunity to repair ; and that an injunction, upon the facts before him, should issue to restrain a summary abatement of the nuisance or nuisances until the person attempting such abatement has given the companies this notice, and such reasonable opportunity to repair.

It is here that our roads diverge. I can not think that such an injunction was authorized by the case presented by the complaints. Moreover, the equities of the bills were fully denied. Nor is there sufficient proof in the affidavits to justify the apprehension that these public officers are acting in a wanton or oppressive spirit, nor to warrant the belief that the abatement of non-insulated wires is to be used as a pretext for the unnecessary destruction of any part of the plaintiffs' system which is not really dangerous to the community. The case is consequently within the principles laid down in *Hart v. Mayor*, 9 Wend. 571 ; *Meeker v. Van Rensselaer*, 15 id. 397 ; *Cronin v. The*

People, 82 N. Y. 320, and similar cases. It is freely conceded that this power of abating nuisances must be reasonably exercised, and, as is said by Judge DILLON in his work on Municipal Corporations (vol. 1, § 95), "although the power be given to be exercised in any manner the corporate authorities may deem expedient, it is not an unlimited power, and such means only are intended as are reasonably necessary for the public good. Wanton or unnecessary injury to private property and private rights are not thereby authorized." Citing *Babcock v. City of Buffalo*, 56 N. Y. 268. There is another principle which should be conceded with equal freedom; and that is that the corporate authorities can not by their mere declaration make that a nuisance which in fact is not.

Where, however, the thing sought to be abated is "intrinsically and inevitably a nuisance," there, as is said by Judge DILLON (vol. 1, § 379), "the authority to preserve the health and safety of the inhabitants and their property is a sufficient foundation for ordinances suppressing and prohibiting it." "Much," he adds, "must necessarily be left to the discretion of the municipal authorities; and their acts will not be judicially interfered with, unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them."

The cases cited abundantly establish the proposition that Mr. Gilroy had a right summarily to abate the common nuisance of any non insulated wire found to exist in the plaintiffs' systems. He had this right both individually and officially, and he was not dependent for his justification upon either the resolution of the board or the order of the mayor. In *Meeker v. Van Rensselaer*, *supra*, the defendant was an alderman. He was sued for pulling down five dwelling houses, which were proved to be nuisances. He also proved that the board of health had directed the nuisances to be abated. The Supreme Court held that his justification on the latter head failed, because the minutes of the board had not been produced; but the

court said that in its judgment the proof was immaterial, "because the defendant did not need any authority from the board of health. *As a citizen* of the fifth ward, who desired to preserve the public health, and *especially as an alderman*, he was fully justified in every act done by him." According to the ruling now under review, a court of equity might have enjoined that citizen and alderman until he had given the owners of the five houses notice, and a reasonable opportunity to abate; and, indeed, such an injunction would have been more reasonable in a case where the mere touch of the houses did not necessarily involve immediate death. So in *Hart v. Mayor, supra*, it was held that the municipality, *as a corporate body*, had the right to abate a nuisance detrimental to the trade of the city; and the court of errors affirmed an order of the chancellor dissolving an injunction which restrained the corporation from summarily abating such nuisance. Mr. Justice SUTHERLAND said that the right did not depend upon the validity of the ordinance, *considered as a legislative act*, any more than it does here upon the resolution of the board or the order of the mayor; but that the real question was "whether the corporation had power *upon any principle whatever*, to do the act which the ordinance authorized to be done. The injunction restrained the corporation *and their officers* from intermeddling with or removing the complainant's float. If that float is a public nuisance which the corporation had a right to abate, that right cannot be affected or impaired by their having undertaken, in the form of an ordinance, *to prescribe to their agents or officers the manner in which they should proceed to cause it to be removed*. I have already expressed the opinion that this float, considered as an unauthorized obstruction either of the river or the basin, was a public nuisance; and the books lay down the rule, in very broad terms, *that any person* may abate a common nuisance." In the same case, Senator EDMONDS said that he entertained no doubt that the "respondents, *as a corporate body*, had a right to abate the nuisance." Any person, he said, "may

abate a common nuisance." The objection was there made that the plaintiffs, by their corporate action, would be deprived of their property without due process of law or trial by jury. To this Mr. Justice SUTHERLAND answered that the provision of the constitution was inapplicable, because there was a right summarily to remove the obstruction. "Formal legal proceedings," he observed, "and trial by jury are not appropriate to, and have never been used in, such cases." To the same effect Senator Edmonds (see his remarks at pages 609 and 610). If these doctrines were maintained in a case where commercial interests alone were in question, and where the obstruction was claimed to be but partial and limited, surely *a fortiori*, they apply where human life and the free enjoyment of the highway (without fear or apprehension) are involved.

To require a preliminary notice under such circumstances would be to paralyze the legal agencies provided to secure the safety of the inhabitants of the city, and to set a premium upon corporate negligence; that, too, in a case where the highest corporate diligence is demanded. Nothing whatever should be permitted to stand between the officer of the municipality and the actually non-insulated wire, nor should he be hindered or delayed for one moment in his laudable purpose of protecting his fellow citizens by its neutralization. If in destroying its deadly force the officer exceeds his duty, the remedy at law is ample. So also, is the remedy in equity, if he shall attempt unnecessarily to destroy the entire system, or so large a part of it, as substantially to bring about that result, or otherwise to work irreparable injury, in the sense which we have pointed out. But, so long as he acts fairly and moderately, without wantonness or oppression, he has nothing to fear. At all events, the last thing that should be set in motion to paralyze his honest efforts for the protection of human life is the power of the court of equity, exercised on mere motion *pendente lite*.

In my judgment, this part of the order should be reversed, and the injunction, as to Gilroy, wholly dissolved. That

part of the order which enjoins the board of electrical control from preventing repairs was clearly unauthorized. It is in the nature of a final, mandatory judgment, and is in effect a peremptory *mandamus*, granted before trial in an equity suit. The facts upon which it was granted showed that the only substantial dispute was as to the right to replace old wires by new ones, larger in size, and of greater conductivity. The general right to repair had been conceded long before the commencement of these suits.

Upon these facts, the utmost that the plaintiffs would have been entitled to, even in a proper proceeding, was an alternative *mandamus*; and, in view of the discretion vested in the board with regard to fresh constructions, and the probability that such discretion covered larger wires, of greater conductivity, even an absolute denial of an application for a *mandamus* would have been justified. Both upon the facts, then, and the law regulating such procedure, this part of the injunction should fall with that which has been the main subject of consideration.

VAN BRUNT, P. J.: I concur in the additional suggestions contained in this opinion.

BRADY, J.: I concur with my brethren that the order appealed from should be reversed.

I regret that my duties in the Oyer and Terminer have been so prolonged that I am unable to state fully my views of the questions presented for consideration on this appeal; and I must content myself with a very brief opinion, in order not to delay the decision herein. Whatever rights the plaintiffs have acquired by legislative grant are subject to the dominant law of public safety; and it must be assumed that such rights were secured and invoked with knowledge of this controlling principle. The Legislature has no power to violate it, and consequently none to authorize an enterprise to be conducted in the public streets by the use of a death dealing factor, unless the conditions imposed, surrounding and controlling it, are such as to secure the public safety, not for a time, but for all time during its use. And whenever this safety ceases to exist, the business

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immediately becomes a nuisance, more or less, and may be abated as such by any citizen who chooses to exercise the power; he assuming only the responsibility of proving it to be as asserted.

Indeed, the object of the subway for which the Legislature called and provided by various acts is undoubtedly, in part, at least, based upon the dangerous character of the plaintiffs' business, and the legislative duty of securing public safety. The creation of a business, extra hazardous, in the public streets, or of organizations to use elements therein dangerous to life from their very nature can only be legal, if at all, when they are so burdened as to secure the public safety preliminarily to such use, and its continuance by the untiring and, indeed, unfailing vigilance of the person or corporation. If this cannot be done, then a nuisance is created and exists, and not a lawful enterprise. There should, in other words, be no intervals of this safety when life may be sacrificed by the condition of some instrument or agency used in the business. This may seem to be a severe, even harsh rule; but the duty to secure the public safety, the lives of citizens, renders its enforcement imperative.

Order reversed, with ten dollars costs and disbursements.

NOTE.—This case is cited in *American Rapid Tel. Co. v. Hess*, *post*.

See note to preceding case; also note to *Brush Elec. Illum. Co. v. Consolidated Tel. & Elec. Subway Co.*, *post*.

The opinion of ANDREWS, J., in the above case, at Special Term Chambers, is reported in full in the *New York Law Journal* of October 30, 1889. It contains an elaborate analysis and consideration of the various statutes in question, and although reversed, might, but for its great length, have been here reprinted.

In connection with the decisions under the series of statutes collectively known as the "New York subway acts," the history of the legislation upon the subject may be of interest.

The original act, laws 1884, chapter 534, is given in full at 2 Am. Elec. Cas. 215.

It soon became evident that the provisions of this statute were so harsh that its enforcement was impossible. Accordingly in 1885 another act was passed (ch. 499), providing for the appointment, in cities of the

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same grade covered by the earlier act, of three disinterested persons "to be a board of commissioners of electrical subways," which board was "charged with the responsibility of enforcing the provisions of" the act of 1884; which act was "hereby amended and made to conform in all respects to the provisions of this act." The duty of the board of commissioners was defined to be "to cause to be removed from the surface and put, maintained and operated underground, wherever practicable, all electrical wires or cables used or to be used in the business of any such company in any street, avenue or other highway in any such city, so as to enable and require all duly authorized companies operating or intending to operate electrical conductors in any street, avenue or highway, of any such city as is or shall be affected by the provisions of said act, to transact their business with underground conductors wherever practicable." (Sections 1 and 2.)

The third section requires all companies desiring to place wires underground to file with the board a map of the proposed location, dimensions and course of the conduits proposed by them, and makes the approval of the plan of construction by the board a prerequisite to the work.

Sections 4 and 5 are as follows :

Sec. 4. It shall be the duty of said board of commissioners to carefully investigate any and all methods proposed by any such company for electric lighting or electrical communication by the use of conductors along or across any street, avenue or other highway in any such city; and, before approving of any such method, said board of commissioners shall require that, so far as practicable, all such conductors when constructed shall be underground; provided no suitable plan is proposed or in use, within sixty days after the passage of this act, it shall be the duty of such board to cause to be devised and made ready for use such a general plan as will meet the requirements of said act and of this act, and the board shall have full authority to compel all companies operating electric wires to use such subway so prepared in accordance with the provisions of this act. Wherever, in the suburbs or along the streets, avenues or other highways in sparsely inhabited or unoccupied portions of any such city, the public interests do not require the electrical conductors to be placed underground; and, wherever, in any other locality of any such city, it is deemed by said board to be, for any cause, impracticable to construct and successfully operate underground the electrical conductors required by any such company; then, and in either of those cases, it shall be the duty of said board of commissioners to examine and grant the application of any such company for permission to deviate therefrom an underground system; but the board shall not grant any such permission unless the board shall be satisfied, upon investigation, that such a permit should, and for one or the other of the reasons hereinbefore stated, be in such case granted and that it will not interfere with the successful working of underground con-

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ductors elsewhere in such city. Any such permit shall be held and construed to authorize the construction and maintenance of the lines of conductors therein provided for, as and where prescribed by the board. It is hereby made the duty of the said board of commissioners, in granting any such permit for other than underground electrical connections, to bear in mind the policy and purpose of this act, which is to convert the overhead systems of electrical wires and cables now in use in said cities to underground systems as soon as possible without impairing the efficiency of their service; to require that, as far as practicable, all electrical conductors in any street, avenue or other highway in any such city shall be removed from the surface and placed and operated underground, as soon as may be consistent with the convenient use thereof by the public; and that it is intended hereby to authorize other than underground electrical conductors, to be used in the streets, avenues or other highways of any such city only when and where the public interests do not require the electrical conductors to be placed underground, or when and where it shall be deemed by the board itself to be impracticable to place and operate the conductors advantageously underground as aforesaid; and that it is hereby intended to make all aerial or other electrical connections incidental only to such underground methods, and to require that they be authorized only when and where needed for the convenient use of the public or where the underground conductors can be made thereby more useful. The work of constructing every line of conductors authorized by any such permit, so granted, shall be subject to the rules and regulations, not inconsistent herewith, prescribed or to be prescribed by the local authorities having control of such streets, avenues and other highways in such city; every such permit shall specify the location of the structures to be erected and to be used for sustaining the electrical conductors, and shall give the general dimensions thereof; and a copy of every such permit shall be filed by said board of commissioners in the office of the mayor of such city to which it relates, and shall be recorded there in a book to be provided and kept for that purpose, which shall be at all times accessible to the public. It shall be the duty of said board in devising the aforesaid plan so to devise the same that the subway may be used by any such city for the electric wires or conductors operated by its police, fire or other departments without expense except the expense of the wires or conductors, but no such city shall be compelled to place any such wires or conductors underground until the money has been specifically raised therefor by the proper authorities, and until that time any such city may continue to use and extend such wires in the same manner as though this act and the act referred to in the second section of this act had not been passed.

Sec. 5. Whenever said board of commissioners, in carrying out the provisions of said act, shall permit any aerial electrical wires or cables to be carried along or across and above the surface of any of the streets,

avenues or other highways of any such city to be crossed by aerial electrical wires or cables, it shall be the duty of the board to designate also, in such permit, the route and location thereof, and to prescribe and regulate the height at which such wires or cables shall be placed; and it is hereby expressly provided that when any such permit shall be granted by said board of commissioners, in extending the connections of any subterranean electrical conductors for the erection of any structure or structures for sustaining electrical conductors above the surface of any highway, or for placing wires or cables on any such structure or elsewhere than underground, or for carrying any such wires or cables across or along and above the surface of any highway or for placing wires or cables on any such structure or elsewhere than underground, or for carrying any such wires or cables across or along or above the surface of any highway or over or into or in the rear of any building or block in any such city, any and all such structures, and any and all such wires or cables, shall be so erected and maintained as not to interfere with the other public uses of such streets, avenues or other highways.

The remainder of the act fixed the term of office of the commissioners which was to expire November 1, 1887, or earlier; and provided for other details; in respect to some of which matters the act was amended by laws 1886, chapter 508, and laws 1887, chapter 664.

In 1887, a new statute (ch. 716) was enacted, which provided, by its first section, that from the date of its passage, June 25th, until November 1st, 1890, the then board of commissioners of electrical subways of New York city and the mayor should constitute "the board of electrical control in and for the city of New York," to whom were transferred all the powers and duties of said former board; and section 2 directed the former board to turn over to the new board, within ten days after the passage of the act, all its maps, books and papers. Sections 3-7 are as follows:

Sec. 3. Whenever, in the opinion of the board hereinbefore constituted, in any street or locality of said city a sufficient construction of conduits or subways underground shall be made ready under the provisions of this act, reference being had to the general direction and vicinity of the electrical conductors then in use overhead, the said board shall notify the owners or operators of the electrical conductors above ground in such street or locality to make such electrical connections in said street or through other streets, localities or parts of the city with such underground conduits or subways so specified as shall be determined by the said board, and to remove poles, wires or other electrical conductors above ground and their supporting fixtures or other devices from said street and locality within ninety days after notice to such effect shall be given. This provision is made a police regulation in and for the city of New York, and in case the several owners or operators of such wires and the owners of such poles, fixtures or devices, shall not cause them to be removed from such street or

locality as required by such notice, it shall be the duty of the commissioner of public works of said city to cause the same to be removed forthwith by the bureau of incumbrances upon the written order of the mayor of said city to that effect.

Sec. 4. It shall be unlawful after the passage of this act for any corporation or individual to take up the pavements of the streets of said city, or to excavate in any of said streets for the purpose of laying underground any electrical conductors unless a permit, in writing, therefor shall have been first obtained from the said board, or its predecessors, and except with such permission, no electrical conductors, poles or other figures or devices therefor, nor any wires, shall hereafter be continued, constructed, erected or maintained or strung above ground in any part of said city. The said board of electrical control may establish, and from time to time may alter, add to or amend all proper and necessary rules, regulations and provisions for the manner of use and management of the electrical conductors, and of the conduits or subways therefor constructed or contemplated under the provisions of this act, or of any act herein mentioned.

Sec. 5. From and after the first day of November, eighteen hundred and ninety, all rights, powers and duties vested or existing in the said board of electrical control by this act created, or in the board of commissioners of electrical subways, heretofore existing in said city, shall vest in and shall thereafter be held and exercised by the commissioners of the sinking fund in the city of New York.

Sec. 6. The agreement made by and between the commissioners of electrical subways for the city of New York and the consolidated telegraph and electrical subway company (a corporation duly organized and existing under the laws of this State) under date of July twenty-seventh, eighteen hundred and eighty-six, when and as amended and modified by a second and further contract or agreement between the said parties, dated the seventh day of April, eighteen hundred eighty-seven, is hereby ratified and confirmed, subject, however, to all the provisions of this act. But if at any time or for any reason the said agreement so amended shall be or become inoperative or ineffectual for the accomplishment of its just purpose and the purposes of this act, or if the said company shall be unable, or after reasonable notice and opportunity given by the said board or its successors, it shall fail or decline to comply with or carry into effect the said agreement in all its terms, then in such event the said board or its successors may, with the approval of the mayor and the counsel to the corporation of the city of New York, make such new, further or different contracts with the same or other parties as may be reasonable or necessary to carry into effect the provisions and intent of this act.

Sec. 7. In case, and whenever it shall be made to appear to the satisfaction of any of the justices of the Supreme Court, or any judge of the Court of Common Pleas, in and for the city and county of New York, or any

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judge of the Superior Court of the city of New York, or to the satisfaction of either of said courts, that the said board constituted by this act, or its successors, or any officer or agent of said board or its successors, or the said The Consolidated Telegraph & Electrical Subway Company, or any corporation or persons claiming under the said board or its successors, or under the said company, shall have violated or shall have failed to observe and fully perform or to carry into full effect all or any of the provisions of this act, or of either of the acts hereinbefore mentioned, or of the said agreement, or shall have failed to furnish just and equal facilities under this act or the said agreement to any and all corporations lawfully competent to manufacture, use or supply electricity, or to operate electrical conductors in any street, avenue or highway in the city of New York, applying for such facilities upon such terms that to the court shall appear just and reasonable; then and in every such case said judge or justice or court may, by proper proceedings in the nature of a writ of mandamus or by mandamus, enforce the provisions of this act or of the acts before mentioned, or of the said agreement, or of any agreement made under the said acts, or compel the granting of such facilities, or may grant such relief as may be proper in the premises. And the said board or its successors, or the mayor, aldermen and commonalty of the city of New York, or any person, company or corporation aggrieved by any such violation or failure as aforesaid, shall be entitled to institute and maintain such proceedings as are by this section authorized.

By laws 1890, chap. 550, the term of office of the board of electrical control was extended to Nov. 1, 1891.

Laws 1891, chap. 231, provides as follows :

Section 1. The board of electrical control in and for the city of New York is authorized, with the consent of the Consolidated Telegraph and Electrical Subway Company, to enter into new contracts with said company and with the Empire City Subway Company (limited), providing for a division of the work of constructing, maintaining and operating subways in said city in such manner that the work of constructing, maintaining and operating subways for telegraph and telephone conductors, and for the low tension conductors of the Edison Electric Illuminating Company of New York shall be done by the Empire City Subway Company (limited), and the work of constructing, maintaining and operating all other subways shall be done by the Consolidated Telegraph and Electrical Subway Company. Such new contracts shall be in accordance with the resolutions of said board, adopted the fifteenth day of December, eighteen hundred and ninety, and in accordance with the terms of the proposed contracts mentioned in and approved by said resolutions, subject to the provisions of this act. The Consolidated Telegraph and Electrical Subway Company may also convey and transfer to the Empire City Subway Company (limited) such of the subways already constructed as the last named company shall in and by such new contract be authorized to maintain and operate.

By laws 1892, chap. 268, the term of office of the board of electrical

control was extended to Nov. 1, 1893, and the following was enacted as section 2:

Sec. 2. It shall be unlawful, after the passage of this act, for any corporation or individual to take up the pavements of the streets of said city, or to excavate in any of said streets for the purpose of laying underground any electrical conductors or constructing any conduit or subway for the reception of electrical conductors, unless a permit in writing therefor shall have been first obtained from said board, and except with such permission no electrical conductors, poles or other figures or devices therefor, nor any wires shall hereafter be continued, constructed, erected or maintained, or strung above ground in any part of said city. No such permit shall be granted by said board unless, if the application be for underground construction, there is an existing demand for the construction of such conduits or subways; nor unless the occupation of said conduits or subways is reasonably assured, and the public interests require the construction thereof; or if the application be for permission to deviate from an underground system unless the case is one of those in which such deviation may be legally permitted under authority of the act, chapter four hundred and ninety-nine of the laws of eighteen hundred and eighty-five. This provision is made a police regulation in and for said city. It shall be the duty of the said board to require of any corporation or individual making application for the construction of subways, that before the construction of such subways shall be ordered, the applicant shall furnish to the corporation which shall be ordered to build such subways satisfactory security for the occupation by it of the subways which shall be constructed at its request, and the payment of the established rentals therefor yearly in advance, during such period as the board shall determine, not less than five years. The said board of electrical control may establish and from time to time may alter, add to or amend all proper and necessary rules, regulations and provisions for the manner of use and management of the electrical conductors, and of the conduits or subways therefor constructed or contemplated under the provisions of this act or of any act herein mentioned. Nothing herein contained shall be construed to authorize any corporation or individual to take up the pavements of said city, to excavate in any of said streets, or to erect poles in any part of said city, unless a permit in writing therefor shall have been first obtained from the department of public works of said city. This act shall not affect the rights of any corporation or individual, inconsistent herewith, respecting which rights any litigation is now pending in the Supreme Court of the United States.

Laws 1893, ch. 896, extended the term of existence of the board to Nov. 1, 1894; and Laws 1894, ch. 207, further extended it to Nov. 1, 1897.

Laws 1892, ch. 454, contains a new provision for the appointment of commissioners of electrical subways in cities of between 500,000 and 1,000,000 population, the former statute upon that subject having expired by limitation in 1887.

**EAST RIVER ELECTRIC LIGHT COMPANY, Appellant, v.
HUGH J. GRANT, as Mayor, &c., et al., Respondents.**

Superior Court of New York City, March 4, 1890.

(57 Superior, 553.)

WIRES IN STREETS.—NEW YORK BOARD OF ELECTRICAL CONTROL.

The board of electrical control of the city of New York permitted the plaintiff, an electric light company, to string wires upon certain existing poles, which belonged to telegraph companies. Held, that this was a mere license, and did not bind either the board to its continuance or the owners of the poles to maintain them; and that the plaintiff was not entitled to an injunction restraining the board from removing the wires; the poles having been abandoned by their owners.

Also held that, it being admitted that upon reasonable notice and for reasonable cause the board had power to require the removal of both poles and wires; and the reasonable cause appearing and the length of reasonable notice not being shown by the plaintiff, it failed to make a case for injunction.

APPEAL from order of Special Term, denying motion for continuance of temporary injunction restraining defendants, to wit, the mayor, the board of electrical control, the commissioner of public works and the superintendent of the bureau of incumbrances, from removing certain electric wires from the poles in New York city.

The Special Term opinion was as follows:

"INGRAHAM, J.: By the permit of September 7, 1888, the board of electrical control authorized the plaintiff to string four wires on existing poles in Sixth avenue, from Eighteenth street to Carmine street. At the time the permit was granted the Metropolitan Telegraph Company and the Western Union Telegraph Company owned certain poles in Sixth avenue, and under some agreement with these companies the plaintiff placed the four wires on such poles.

The power of the board of electrical control to grant such permit, and the effect of such permit, when granted, depend upon the provisions of chap. 499 of the laws of 1885, and chap. 716, laws 1887. By the latter act all the powers and duties conferred or imposed by the act of 1885 upon the commissioners appointed thereunder, and all the powers and duties imposed upon the local authorities of the city, or any of them, in respect to, or affecting the placing, erecting, construction, suspension, maintenance, use, regulation or control of electrical conductors, or conduits or subways for electrical conductors in said city, were transferred to, conferred and imposed upon, and were thereafter to be conclusively exercised and performed by, said board of electrical control. This provision gave to the board all the power in regard to the electrical conductors in the public streets which before that act had been exercised by any officer or department of the municipal corporation, or by the commissioners appointed by the act of 1885.

“There is nothing in the act in question that would limit the power of the board to revoke a permit, or authorize the court to substitute its discretion as to the continuance of electrical conductors erected by permission of the board; nor does the fact that the board gave to a corporation permission to string its wires upon certain existing poles amount to a guaranty that the poles shall always exist, or that the board will keep the poles in the position in which they were at the time the permit was given. It is apparent that such a permit was to continue only so long as the poles should continue in the streets; and, when the poles as erected became unnecessary for the use for which they were originally or primarily intended, it is clear that the corporation should not compel the board or the owner of the poles to maintain them in the position in which they were at the time the permit was given. The permit was a mere license, revocable at any time by the board that granted it; and when, in consequence of the removal of the wires of the companies that

owned the poles, they became no longer necessary for the use to which they were primarily put, in the absence of an express contract, neither the board nor the city was bound to maintain the poles, nor see to it that they were not removed.

"This is just what happened. It is clear that, as between plaintiff and the telephone company, plaintiff could not compel the telephone company to maintain these poles for the purpose of maintaining plaintiff's wires. The telephone company having no further use for the poles, have abandoned them, and the board has revoked plaintiff's permit to use the poles for its wires; and I can see no ground upon which plaintiff can claim that either the telephone company or the board of electrical control is bound to keep the poles in position, and that the plaintiff can use them.

"The ordinance of the common council, under which the plaintiff is acting, is expressly subject to the power of the electric commissioners. Upon that board are conferred all the powers before conferred upon the local authorities. The permit under which the plaintiff acted was subject to the rules and regulations of the board, and I think it is clear that when the board, having power to say when the existing poles shall be removed, directed such removal, the plaintiff had no right to insist that the poles shall remain.

"Motion to continue the injunction denied, and temporary injunction dissolved, with \$10 costs."

William H. Kelly and Michael J. Kelly, for appellant.

William H. Clark and David J. Dean, for respondent.

BY THE COURT.—SEDGWICK, C. J.: The action was for an injunction restraining the defendants from proceeding to remove the wires of the plaintiff from certain poles in the Sixth avenue, from Eighteenth street to Carmine street.

I am of opinion that the views expressed by the learned

judge below in dissolving the temporary injunction were correct. Some considerations not pertinent to the view he took, may be adduced in support of this result.

The complaint was demurrable. It placed the plaintiff's right to use the poles upon its possessing a franchise under the terms of an ordinance, as follows: "That permission and authority are hereby given and granted unto the East River Electric Light Company to place, construct, and to use wires, conduits, and conductors for electrical purposes in the city of New York, and over and under the streets, avenues, etc., according to such plans as may be directed, approved, or allowed by and subject to the powers of the electrical subway commissioners and to the provisions of chapter 499 of the laws of 1885." There were, however, no allegations of fact to show that the plaintiff "strung its electric wires" according to the plan and the provisions referred to in the ordinance. There was no averment that it had received a permit from the board of electrical control to use the poles for the wires. It alleged a matter of law only, that it strung its wires "pursuant to the authority conferred upon it by law."

The plaintiff did not show a right to the equitable and discretionary relief of injunction. The object of the relief, as asked, was to restrain the commission of a trespass. The facts, however, stated in the complaint and in the affidavit did not prove that the plaintiff could not obtain full and adequate relief by the recovery of damages.

It was admitted on the argument that the board of electrical control could upon reasonable notice, for reasonable cause, require the plaintiff to remove its wires from the poles. It appeared that there was reasonable cause on which the board could act. For instance, the poles themselves were incumbrances which might be lawfully removed, and the poles were of a size that was not necessary to the business of the plaintiff. Therefore the right of plaintiff, construing all things most favorably to it, was to maintain the wires until such reasonable notice. The plaintiff did not show what the time of reasonable notice would be, and, of course,

did not show the extent of the damages the plaintiff would suffer from not being permitted to retain its wires upon the poles during the lapse of that time.

The plaintiff in part relies upon a permit of the board that authorized the plaintiff "to string four wires on existing poles on Sixth avenue, from Eighteenth street to Carmine street." The permit necessarily referred to the poles as then rightfully there. It was not implied that the permit should operate after the poles ceased to be rightfully in the streets.

The order should be affirmed with \$10 costs to abide the event, and the disbursements to be taxed.

TRUAX and DUGRO, JJ., concurred.

NOTE.—See note to *U. S. Illum. Co. v. Grant*, *ante*, p. 95; also to *Brush Elec. Illum. Co. v. Consolidated Tel. & Elec. Subway Co.*, *ante*.

This case is cited in *United States Illum. Co. v. Grant*, *post*.

In *Manhattan Electric Light Co. v. Grant*, mayor, &c., et al., 81 N. Y. St. R. 254, mem. 561 Hun, 642, decided at the same time as the above case, the relief sought was an injunction to restrain the transfer of the subways from one company to another and the making of a contract with the new company for the construction of further subways. The plaintiff was the owner of wires and cables in the existing subways and of others which would have to be placed in the new ones. The following is the opinion in full:

Per CURIAM: The plaintiff in this action has no such rights secured to it either by the statutes or the agreement which it has made as entitle it to interfere with the action of the board of electrical control for the construction of the remaining subways, and no injunction at its suit is required by the circumstances.

The order will, therefore, be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., BRADY and DANIELS, JJ., concur.

GEORGE E. ARMSTRONG, Appellant, v. HUGH J. GRANT,
Mayor, &c., and others, Respondents.

N. Y. General Term, First Dept., March, 1890.

(56 Hun, 236.)

NEW YORK SUBWAYS ACTS.—ILLEGAL CONTRACT.—TAXPAYER'S ACTION.

A proposed contract of the board of electrical control of New York city, with a company engaged in the business of constructing subways for electric wires, held to be illegal in specified particulars. Also held, that the remedy was properly sought by means of a taxpayer's action.

APPEAL from order denying motion to continue an injunction restraining the board of electrical control of the city of New York from making a specified or any contract with the Standard Electrical Subway Company for the construction or maintenance of subways for electrical conductors in the streets. The facts are sufficiently stated in the opinion.

Elihu Root and *De Lancey Nicoll*, for appellant.

Wheeler H. Peckham, *W. U. Cohen* and *D. J. Dean*, for respondents.

PER CURIAM.: This action has been brought by the plaintiff, who is a taxpayer of the city of New York, upon property assessed for an amount exceeding the sum of \$1,000. The object of it is to prohibit and enjoin the making and execution of a contract proposed to be made between the Standard Electric Subway Company and the board of electrical control in and for the city of New York, created and authorized to act under chapter 716 of the laws of 1887. The plaintiff placed his right to maintain the action upon the authority created by chapter 673 of

the laws of 1887. This act authorizes any person, or number of persons, whose assessments for the payment of taxes upon their property shall exceed \$1,000, upon giving the security therein mentioned, to prosecute and maintain an action against all officers, agents, commissioners and other persons, acting for and on behalf of any county, town, village or municipal corporation in this State, and each and every of them, to prevent any illegal official act on their part, or to prevent any waste or injury to, or to restore and make good any of the property, funds or estate of such county, town, village or municipal corporation.

The act, as it has been in this manner adopted, is very broad and comprehensive in its provisions. Its object seems to have been to vest the taxpayer with the authority of restraining not only municipal corporations in the State, but their officers, from violating the obligations and duties of their trusts by any illegal official act, or any act which would cause waste or injury to the funds, property or estate of the municipality. And if the contract which is proposed to be made between the board of electrical control and the Standard Electric Subway Company would be either illegal, or produce waste or injury to the property of the municipality, then the plaintiff, as a taxpayer, is invested with the right to maintain and prosecute the action.

The objection has been taken that other parties should have been brought into the action to enable the plaintiff to maintain it under the authority of this statute. But if this objection should be held to be well founded, it would be no answer to the right to maintain the action, for, by section 452 of the Code of Civil Procedure, ample provision has been made to supply any defect which may be found in the action in this respect. It has been there declared that where a complete determination of the controversy can not be had without the presence of other parties, the court must direct them to be brought in. But, as no vested rights have been acquired, there would seem to be no ground for this objection.

The case, accordingly, is not one on this account for the dismissal of the complaint or the denial of such relief as will prevent the consummation of the illegal acts which the statute has intended to avoid. The members of the board of electrical control have been made parties to the action, whose object is to prevent them from doing that which may be found to be intended to be done without lawful authority; and if a case has been presented from which it can be seen that such an illegal and wasteful act is contemplated or intended by the members of this board, they may be prevented from consummating it by an injunction; that board having no general authority to act, but deriving all their authority from the provisions of the statute.

The object of the legislation concerning the action of this board has been to provide the means for placing the electric and telegraphic wires used in the city in subways to be constructed and maintained under the surface of the streets of the city. This legislation, so far as it is required to be considered in this action, is contained in chapter 499 of the laws of 1885, chapter 503 of the laws of 1886, and chapter 716 of the laws of 1887. The latter act has defined and declared more particularly the manner in which this object shall be attained through the action and authority of the members of the board of electrical control.

In the year 1886 they entered into a contract with the Consolidated Telegraph and Electric Subway Company, for the construction and maintenance of the subways mentioned and referred to in it. A further agreement was also entered into, modifying and changing this contract in respects not necessary to be considered in the disposition of this appeal, which contracts were validated, except as to a few of their features, by the act of 1887. This company proceeded in the construction of the subways mentioned in this contract; but they have not been completed, and the company has announced that in their opinion the subways cannot be completed in less than two years. It has not refused to proceed with the work, but in consequence of an arrangement or understanding entered into with the Standard

Electric Subway Company it proposes to surrender and assign all its rights and interests in certain portions of these contracts, and the work it has already performed, to the latter company; and to carry this arrangement or understanding into effect a contract has been proposed by the Standard Electric Subway Company, and sanctioned by the counsel for the city of New York; and whether this contract, in this manner accepted, is one which the acts already mentioned will allow to be executed and carried into effect is the more important part of the controversy now before the court.

Previous to the time when the form of the contract was determined, and on or about the 19th of February, 1890, a resolution was adopted by the board of electrical control containing a statement of the streets and avenues in which it was intended that these subways should be constructed, and by this resolution it was stated that they should be built within the current year of 1890. This was the obvious as well as the expressed purpose of the board as to the time. It was designed that the work should be done with the greatest possible expedition, and the streets mentioned in the resolution thereby provided with an adequate system of lights by corporations or individuals who might be authorized to use the subways. But this resolution has been made no part of the contract which it is proposed shall be entered into. It has, it is true, been generally referred to therein, but nowhere has it been made a part of this contract; neither has the party with whom it is proposed to make the contract been in any manner obligated by its terms or its necessary implications, either to construct the subways within the current year or in the streets and avenues mentioned in the resolution. This part of the contract, as it is recited is, that it is deemed reasonable, advisable and proper, for the purpose of carrying into effect the provisions and intent of the act of 1887, that the contract should be made; and that act certainly contemplates the construction of the subways with all possible dispatch, and the removal of the poles and wires from the

streets and the placing and operating of these wires in the subways.

The immediate object of the board was that the subways should be made to include the streets and avenues mentioned in the resolution, and be completed within the current year. But that object the contract, as it has been drawn and is proposed to be executed, in no manner secures to be accomplished. Certain recitals are contained in the preceding part of the proposed contract. But none are so expressed as to include the construction and maintenance of subways in the streets or avenues or within the time mentioned in the resolution. Its recitals refer to the fact that a contract had been entered into with the Consolidated Subway Company for the building of subways, and that certain subways had been built by that company; and that the company had conveyed to the Standard Subway Company all the subways, conduits, and ducts it had built except those appropriated to the use of the Edison Electric Illuminating Company; and that the Consolidated Company had applied to the board for such a modification of its own contract as would relieve it from obligation to manage and maintain and operate the subways, and from the further obligation to build subways for electric light and power conductors; and that the members of the board had modified the contract of the Consolidated Company by an instrument of even date; and that the Standard Subway Company were desirous to enter into a contract for building, etc., of such further subways. What these further subways were which the latter company was to enter into a contract to build, is not mentioned in the recitals or anywhere in the proposed contract. But, by the references afterwards made, these further subways have been generally referred to without the addition of any language so far extending them as to include the subways mentioned in the resolution. The contract then proceeds with the covenant that the party of the second part (the Standard Company) agrees to provide, build, equip, maintain and operate, as herein provided, the subways in this

contract mentioned and referred to. What these subways were intended to be was here no further expressed than that they were those mentioned and referred to in the contract, and the contract had mentioned and referred to no more than "further subways;" and the language of the contract in its subsequent provisions has been confined and applied in the same manner. By article 2 of the proposed contract, it has been declared that the subways aforesaid, as the Standard Company shall be directed by the party of the first part to build, shall be built in accordance with the plans and specifications theretofore furnished, or to be furnished, by the board; but no language has been employed in this part of the contract, or indeed in any other, by which this company agreed that it would build such subways as the board should direct it to build. Power to make modifications and changes which might be reasonably necessary has been reserved to the board, but that power extends only to the said subways, or their mode of construction. The next division of the contract uses the language in the same way of "said subways," and so does the paragraph immediately following, with the additional right to the board, in case such subways shall not be sufficient for the companies or corporations applying to use them, that then additional subways sufficient therefor should be constructed and laid. But this does not enlarge the extent of the streets or avenues in which the additional subways should be placed. It merely provides for making the additions where those already constructed shall prove to be insufficient for the corporations applying to use them. The board then reserve to themselves the right to permit any other company or corporation to build the subways not previously ordered to be built by the Standard Subway Company. It further proceeds, in its reference to the subways, to use the same language of "said subways," in no manner enlarging the work to be constructed so as to include any or either of the avenues and streets mentioned in the resolution. In this respect the proposed contract is radically defective, and not within the limits imposed upon the

board by its own resolution adopted, defining and declaring the territory over which the subways should be built and maintained.

A similar defect is found in the contract as to the entire want of any specification concerning the time within which the subways are to be laid. By the resolution which was adopted, the contract to be entered into should limit this to the period of the current year. But there is absolutely no provision in the contract subjecting it to this limitation.

By section 7 of the act of 1887, the power to hear and settle disputes as to the use of the subways has been conferred upon the justices of the Supreme Court, any judge of the Court of Common Pleas, or of the Superior Court of the city of New York, or upon the courts themselves. When any difference may arise as to the terms upon which that use should be granted, this act requires the difference to be settled under its provisions, while by subdivision 10 of the proposed contract it has been provided that in case any dispute shall arise between the party of the second part (which is the Standard Company) and any company occupying or desiring or requiring to occupy said subways, the same should be referred to the members of the board or their successors for settlement, whose decision should be final. This part of the contract was inserted without authority, for the only power which the board has over the subject is that defined and delegated by these different acts.

The eighth section of the act has conferred upon the commissioners of the sinking fund the power to purchase the subways by making the payments mentioned in the section. This provision has been in no way complied with in the contract now under consideration.

By section 15 of the contract, the city, at any time after January 1, 1897, would have the right to buy the subways which had been theretofore constructed under the contract; subject, however, to all leases, mortgages or contracts theretofore lawfully made within the limits imposed by section 12 of the contract. Section 12 imposes no limita-

tion as to the amount of mortgages or incumbrances which might be placed by the company upon the subways constructed by it. The limitations therein contained apply only to the case when the city should take possession of the subways by reason of the failure of the contracting company to comply with the terms of the contract. The result would be that the Standard Company might mortgage to any amount that they pleased, as long as they did not fail to comply with the terms of their contract, so as to make themselves liable to the forfeiture contained in the twelfth paragraph of the contract. The city, if it desired to become the purchaser, would, by the terms of the contract, be required to assume this mortgage, no matter how large it might be, which is in direct conflict with section 8 of the act, which declares that such mortgages at the time of the purchase shall not exceed 50 per cent. of the cost, and the company, by the terms of the contract, would be enabled, by the placing of excessive mortgages upon the property, to prevent the city from becoming a purchaser.

It has also been declared in the proposed contract that the rights of the Standard Company shall be subject to any liability subsequently enacted by the Legislature, and no qualification of that description was included in the resolution or any action taken by the board.

It is true that some of these defects are not so fundamental as to justify, if they stood alone, the prohibition of the court that this contract should not be entered into. But there are others of so radical a nature as to involve an entire want of authority in the action authorized to be taken by the board.

These attributes consist mainly of the omission to bind the Standard Company to the construction of the subways mentioned in the resolution, and to do that within the period of one year, which in the judgment of the board would be sufficient for that purpose, and sections 10 and 15 of the contract, which are in direct hostility to the provisions of sections 7 and 8 of the act of 1887. Experience

has demonstrated the necessity of requiring corporations in their contracts with municipal bodies or their officers to clearly and explicitly define their obligations, and leave as little as possible to future uncertainties; for, after the agreements or privileges may be obtained, the exacting disposition of the parties contracting with these bodies is such as to exclude all possible concessions or understanding which may be essential to promote and protect the interests of the public. .

These contracts cannot be made in language too plain or concise to prevent the possibility of future disputes and controversies. And while the granting of an injunction against the execution of a contract such as the one proposed will be attended with some delay in securing the accomplishment of the object intended to be produced by the action of the board, it will in the end be much more advantageous to the public that its interests shall be clearly and expressly limited here, than to permit the contract now proposed to be entered into to be executed, which could not fail to engender disputes, and would leave it to the volition of the Standard Company to construct subways or not as it might afterwards determine to be most expedient for its own interests.

The plaintiff is in a position, as a taxpayer, to prevent this illegal contract from being subscribed and completed; certainly until it shall be made entirely definite and clear that the rights of the public will be subserved and effectually secured.

We express no opinion as to whether or not, as the facts appear in this case, such a condition of affairs exists as authorizes the board of electrical control to enter into new contracts for the construction and maintenance of subways, because in case it should hereafter be finally determined that such authority did not exist, the Standard Company would be the only party which would be injured, having expended its money in structures under the streets of New York, to which they had acquired no title.

As to any loss which the Standard Company may incur,

the court cannot be concerned in the disposition of the case. It is with those that inhere in the public, and which, by the act first referred to, are designed to be protected, that the court is now called upon to deal.

Neither of these objections, except that as to the time for the completion of the work, seems to have been brought to the attention of the court at Special Term, and they were singularly omitted in the points of the counsel on the argument of the appeal.

The order will be reversed, with ten dollars costs and disbursements, and an injunction issued in the form to be fixed at the time of the settlement of the order.

Present: VAN BRUNT, P. J., BRADY and DANIELS, JJ.
So ordered.

NOTE.—See note to *U. S. Illum. Co. v. Grant*, ante, p. 95; also to *Brush Elec. Illum. Co. v. Consol. Tel. & Elec. Subway Co.*, post.

The case of *Edward Henry v. The Board of Electrical Control*, N. Y. Superior Court, 1891, arose under the last part of section 6 of the act of 1887, viz.: "But if at any time or for any reason the said agreement [with the Consolidated Subway Co.] so amended shall be or become inoperative or ineffectual for the accomplishment of its just purpose and the purposes of this act, or if the said company shall be unable, or after reasonable notice and opportunity given by the said board or its successors, it shall fail or decline to comply with or carry into effect the said agreement in all its terms, then in that event the said board or its successors may, with the approval of the mayor and the counsel to the corporation of the city of New York, make such new, further, or different contracts with the same or other parties as may be reasonable or necessary to carry into effect the provisions and intent of this act."

The action was brought by the plaintiff as a taxpayer, and the decision continued a preliminary injunction restraining the board from making a new contract with the Empire City Subway Co., and from relieving the Consolidated Co. from any of its contract obligations. The decision was made upon the ground that it did not appear that the former contract had become inoperative or ineffectual, or that the Consolidated Co. was unable or had failed or declined to carry out its contract; also, that the provision of the contract for releasing certain of the existing subways from forfeiture was unauthorized and illegal.

THE AMERICAN RAPID TELEGRAPH COMPANY, Appellant,
v. JACOB HESS ET AL., Respondent.

New York Court of Appeals, Feb. 24, 1891.

(125 N. Y. 641.)

POLES AND WIRES IN STREETS.—LEGISLATIVE AND MUNICIPAL CONTROL.—
NEW YORK SUBWAYS ACTS.

A telegraph company organized under the act of 1848, and obtaining from it the right to construct its lines of telegraph upon the public streets or highways, acquires no absolute interest in the highway or the land. It is subject to the police power of the State, wielded through its municipal agencies, which can direct the lines to be taken down and placed in subways provided for them. This interest in the land is in reality nothing more than a mere *license* granted by the State to construct lines along and upon the public roads and highways, and is revocable at the pleasure of the Legislature. See *People v. Dolan*, 126 N. Y., at page 176.

But if the act (laws 1848, chap. 265, as amended laws 1858, chap. 471) conferred a *franchise* upon telegraph companies as to the use of city streets for the maintenance of their lines, the Legislature did not and could not divest itself of its control over the streets for the public welfare, so that it could not thereafter direct and regulate the manner in which the streets shall be used.

The New York subways acts upheld, especially that provision of the act of 1887 which permits the removal of poles and wires by the board of electrical control of the city of New York upon failure of the company after due notice to remove them to the subways.

The contract for the construction of subways in the streets of New York city, made by the board of subway commissioners with the Consolidated Telegraph and Electrical Subway Company, was within the power of the Legislature to authorize and ratify, as was done by the acts of 1885 and 1887 respectively.

The requirements of the post-roads acts of Congress in favor of telegraph companies are fully observed by permitting them to maintain their lines in subways underneath the streets of the city.

Cases of this series cited in opinion: *People, &c. v. Squire*, vol. 2, p. 176; *U. S. Illuminating Co. v. Hess*, vol. 2, p. 187; *U. S. Illuminating Co. v. Grant*, *ante*, p. 95; *W. U. Tel. Co. v. Mayor of New York*, vol. 2, p. 195.

APPEAL from judgment of General Term, First Department, entered upon an order affirming a judgment of Special Term, dismissing the complaint upon the merits.

Facts stated in opinion.

William G. Wilson, for appellant.

D. J. Dean, for respondent.

EARL, J.: Prior to 1883, the plaintiff was incorporated under the act 265 of the laws of 1848, the general act for the incorporation and regulation of telegraph companies, and the acts amendatory thereof, and prior to that year it had erected its lines of telegraph poles and wires in the streets of the city of New York, described in the complaint. It also had extensive connecting lines in other States and throughout this State, which constituted a system of telegraphy then in active use and operation.

Section 5 of the act of 1848 provides as follows :

Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the cords or wires of such lines ; provided the same shall not be so constructed as to incommode the public use of said road or highway or injuriously interrupt the navigation of said waters ; nor shall this act be so construed as to authorize the construction of any bridge across any of the waters of this State.

The act chapter 471 of the laws of 1853 amends the act of 1848, and section 2 thereof provides as follows :

Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of telegraph upon, over or under any of the public roads, streets and highways, and through, across or under any of the waters within the limits of this State, subject to the restrictions in the said recited act contained.

The plaintiff constructed its telegraph lines in the streets of the city of New York, under the acts referred to, without any special grant or authority from the city.

The claim of the plaintiff is that these acts operated as a grant to it of a franchise to use the streets for its poles and wires, and that, therefore, an inviolable contract was created which is under the protection of the Federal Constitution, and hence that neither the State nor the city under its authority could cause its poles and wires to be removed from the streets, except upon compensation to it ascertained in the manner prescribed by the Constitution and laws for cases where private property is condemned for public use.

We think the act of 1848, as amended in 1853, can in no proper sense be said to have granted any interests to the plaintiff in the streets of the city. There certainly was no formal grant, and the statutes contain no terms or phraseology appropriate to a grant. They at most confer upon the plaintiff an authority or license to enter upon the streets for its purposes, and subject to certain conditions. The people of the State do not own the streets, and the only authority the Legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes; and by these acts it in effect determined that one of the purposes for which the streets could be used, was the erection of poles and stringing of wires for the business of telegraphing, and that that was a public use not inconsistent with the use of the streets for general street purposes. These are general, public legislative acts in the exercise of the police power of the State, and, therefore, they were not beyond the reach or touch of future legislation. The Legislature did not intend to divest itself and could not divest itself of its control over the streets for the public welfare, and we must infer, from the language used, that it did not intend to bind itself by an irrevocable grant. If, therefore, these acts are to be construed as merely conferring a license which has been acted upon by the plaintiff, the Legislature could revoke the license or modify it in any way or at any time when the public interest might require it.

But in this case it is not necessary to hold that the plaintiff did not by the acts referred to obtain some sort of fran-

chise in the streets of the city. We may, for the present purpose, construe these acts as constituting, in some sense, grants of interests in the streets to the companies organized under them, and contracts *sub modo* with such corporations, and yet the contention of the plaintiff in this case must fail.

In the exercise of its rights under the assumed grant and contract, this corporation was subject to the regulation and control of the Legislature. By giving the franchise the State did not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the people, nor did the State absolve itself from its primary duty to maintain the streets and highways of the State in a safe and proper condition for public travel and other necessary street and highway purposes. The grant, if any, was made in reference to the streets and their maintenance and regulation forever as streets. The State could at all times regulate the size and location of the poles, the height of the wires from the surface of the ground and their location in the streets; and when the poles and wires became a serious obstruction and nuisance in the streets from any cause, it could take such action and make such provisions by law as were needful to remove the nuisance and restore the utility of the streets for public purposes. The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railroads which by public authority occupy the streets and highways of the State. The State in the exercise of its police power, and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may prescribe the location of the tracks, the size and character of the rails, the precautions which shall be taken for the protection of the public, and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the fran-

chises which such corporations have obtained by statutory authority.

Now what has the Legislature attempted to do in this case? By the act, chapter 534 of the laws of 1884, it was provided that all telegraph, telephone and electric light wires and cables in all cities of the State having a population of five hundred thousand or over, "shall hereafter be placed under the surface of the streets, lanes and avenues" of the city, and that it should be accomplished before the 1st day of November, 1885. It was further provided that in case the owners of the property specified should fail to comply with the act within the time specified, the local governments of the cities should remove, without delay, all such wires, cables and poles whenever found in their respective cities. Under that act no property was or could be taken from any of the owners specified. They were simply required to remove their poles and wires from the surface of the streets and place the wires underground. Their property was not taken, but the use of their franchise was regulated. In 1885 chapter 499 was enacted, which provided for the appointment of a board of commissioners of electric subways, and that board was charged with the duty of enforcing the provisions of the act of 1884. It was made the duty of that board to cause to be removed from the surface of the streets and put and maintained underground, whenever practicable, all electrical wires and cables, so as to enable and require all duly authorized companies operating the same to transact their business with underground conductors whenever practicable. All subways for underground conductors of electricity were required to be built under the direction and control of that board, and no electrical wires or cables were allowed above the surface of the streets without the permission of the board. Commissioners were duly appointed under that act, and in 1886 the Consolidated Telegraph and Electrical Subway Company of New York having been incorporated under the laws of this State, the commissioners entered into a contract with it, whereby it contracted to build, with

its own capital, necessary subways for the electrical conductors, the subways to be constructed in all respects subject to the approval of the commissioners. It was also provided in the contract that all corporations owning and operating electrical wires above the streets should have the right to place them in the subways under certain conditions specified. In 1887 the Legislature enacted chapter 716, entitled, "An act in relation to electrical conductors in the city of New York." By that act the agreement made between the subway commissioners and the Consolidated Telegraph and Electrical Subway Company above referred to was ratified and confirmed, and the act provided that whenever, in the opinion of the board of electrical control constituted by that act, sufficient conduits or subways underground shall have been made ready, the board shall notify the owners or operators of the electrical conductors above ground in such streets or locality to make such electrical connections in such underground conduits or subways as shall be determined by the board, and to remove their poles and wires from the streets within ninety days after such notice. This provision was made a police regulation in and for the city of New York, and in case it was not complied with by the telegraph and other companies referred to, it was made the duty of the commissioner of public works to cause the poles, wires, etc., to be removed forthwith by the bureau of encumbrances upon the written order of the mayor to that effect.

Subways having been constructed in certain of the streets of the city of New York by the Consolidated Telegraph and Electrical Subway Company, under the supervision and with the approval of the board of electrical control, notice was given to the plaintiff as provided in the act to remove its poles and wires from the streets, and place its electrical conductors in such subways. Having refused to comply with such notice and with the provisions of the act, the commissioner of public works of the city caused the poles to be cut down and the wires to be removed from the streets : and this is what the plaintiff complains of.

Its property was not taken for public use ; it was simply removed from the streets where it had become a nuisance, and the public authorities had the same right to remove it from the streets, doing no unnecessary damage, that they had to remove any other encumbrance therefrom. After the passage of the acts referred to and the building of the subways and the notice to the plaintiff, it had no right longer to maintain its poles and wires above the surface of the streets. They were then there without authority and thus became a nuisance, and hence the public officials had the right to remove them. It is quite true that the plaintiff could not remove its electrical conductors into the subways without some expense.

But the same is true of railroads occupying the streets ; they cannot change from one style of rail to another, nor from one place in the street to another, nor make a change of grade without a considerable expense ; and yet the mere fact that they are subjected to expense is no answer to the right of the public, in pursuance of law, to require them to comply with the prescribed regulations.

If the authority did not otherwise exist to require these poles and wires to be removed from the streets it could be found in section 5 of the act of 1848, in which is contained the authority to construct telegraphic lines upon public roads and highways, with the proviso that the same shall not be "so constructed as to incommode the public use of such roads or highways." Who shall judge whether they incommode the public use of the streets ? It is unquestioned that they do, and the Legislature has determined that fact, and when the plaintiff maintained its wires and poles in the streets in such a manner as to incommode the public use of the streets, the Legislature had the right to provide that they should put them under the streets, so that the streets above the surface could be devoted to the public uses for which they were intended.

The plaintiff seeks to strengthen its position in reference to the use of the streets of the city of New York, under the laws of the United States, to which we will make brief

reference. It is provided in section 5263 of the Revised Statutes of the United States that

Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been, or may hereafter be declared such by law, and over, under or across navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.

Section 5268 provides that

Before any telegraph company shall exercise any powers or privileges conferred by law such company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by law.

Section 3964 provides that all letter-carrier routes established in any city or town for the collection and delivery of mail matter are post-roads; and by the act approved March 1, 1884, it is enacted that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post-routes." The plaintiff filed the written acceptance with the postmaster-general required by section 5268.

The precise scope and range of operation of these sections within a State are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the State, except under regulations prescribed for the control of all telegraph companies within the State, nor could such companies interfere with streets and highways in the State so as materially to impair their usefulness as ordinary highways. Nor could these congressional acts deprive the State of its control over its highways and its right to regulate their use under the police power for the public warfare. The laws of Congress are perfectly satisfied by the permission granted to the

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plaintiff, of which it is perfectly feasible for it to avail itself to place its electrical conductors in the subways constructed beneath the surface of the streets.

We have carefully scrutinized the contract entered into by the board of electrical control with the defendants, the Consolidated Telegraph and Electrical Subway Company, and we find nothing in its provisions unreasonable or impractical, and the power of the Legislature to authorize such a contract and to confirm it when made, is beyond doubt. These acts of 1884, 1885 and 1887 have been under consideration in several cases and have uniformly been upheld and enforced. *People ex rel. v. Squire*, 107 N. Y. 593 (1 N. Y. St. R. 633); *United States Illuminating Co. v. Hess*, 19 id. 883; *United States Illuminating Co. v. Grant*, 27 id. 767; *Western Union Telegraph Co. v. Mayor*, etc., opinion by Wallace, J., in U. S. Circuit Ct.

We are, therefore, of opinion that the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

NOTE.—This case is cited in *People v. Dolan*, ante, p. 40.

See note to next case; also note to *Electric Imp. Co. v. San Francisco* ante, p. 89.

THE BRUSH ELECTRIC ILLUMINATING COMPANY, Appellant,
v. THE CONSOLIDATED TELEGRAPH AND ELECTRICAL
SUBWAY COMPANY, Respondent.

New York Supreme Court, General Term, First Dept., June, 1891.

(60 Hun, 446.)

ELECTRIC LIGHT COMPANY.—NEW YORK SUBWAYS ACTS.—INJUNCTION.

Plaintiff, an electric light company, having, with knowledge of the rental price fixed, applied for and been granted the right to place, and having placed its wires in the conduits of the defendant, the company which

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had constructed underground conduits for electric wires in the streets of New York pursuant to the "subways acts," and having refused to pay the rental as fixed, claiming that it was exorbitant, applied to the court for an injunction restraining the defendant from a threatened removal of plaintiff's wires from the subways unless the rent should be paid.

The order of Special Term vacating a temporary injunction and denying a motion to continue it was affirmed, upon the grounds:

1. That the plaintiff was bound as by contract to pay the fixed rental, with knowledge of which it had applied for and been granted the privilege of occupying the conduits and had gone into occupation thereof.
2. That the plaintiff had failed to avail itself of that provision of the statute which makes the board of subway commissioners the arbiters in case of disagreement as to rental prices.
3. That application to the courts, for relief from exorbitant rental, must be made by mandamus, as provided by section 7 of the act of 1886; that the court had no general equity jurisdiction in the premises.
4. That even if the court had equitable jurisdiction the plaintiff had not put itself in position to appeal to it, since it had failed to pay the rent already accrued.
5. That the alleged threatened injury was trespass, for which the plaintiff would have a complete remedy at law.
6. That the interest leased in the subways was neither real estate, for the recovery of which ejectment would lie, nor personal estate, subject to replevin; that it was rather in the nature of a passenger's right to a place in a railroad car or that of a licensee; subject to be terminated by the carrier or licensor upon failure of the passenger or licensee to comply with its contract to pay for carriage or privilege.
7. The fact that the plaintiffs were compelled to occupy the subways is immaterial; such compulsion having been a police necessity; the overhead method of using the streets having become a public nuisance.

APPEAL by plaintiff from order dismissing notice to continue temporary injunction restraining the defendant from interfering with the plaintiff's cables or appliances in the defendant's subway, and from interfering with the operation and maintenance thereof, or plaintiff's access thereto, and from bringing or prosecuting any action or proceeding for the purpose of removing them from the subway; also vacating the temporary injunction. Facts stated in opinions.

Esek Cowen, W. P. Putney, B. F. Einstein and Paul D. Cravath, for appellant.

J. C. Carter, F. W. Coudert. Edward Lauterbach, M. Egleston and W. N. Cohen, for respondent.

VAN BRUNT, J.: The plaintiff in this action, together with the plaintiffs in the other actions argued herewith, were duly incorporated for the purpose of the manufacture, use and transmission of electricity for the production of heat, light and power in the city of New York. and for a long period of time maintained poles and wires and other conductors in the streets of the city by which their currents were transmitted and distributed. Prior to the year 1887 overhead wires were exclusively used by these corporations.

In 1884 the Legislature passed an act which provided that all telegraphic, telephonic and electric light wires and cables used in any incorporated city of this State having a population of 500,000 or over, should thereafter be placed under the surface of the streets, lanes and avenues of the city.

In 1885 an act was passed by which in cities having a population exceeding a million, the mayor, comptroller and commissioner of public works of such city were authorized and directed to appoint three disinterested persons who were to be a board of commissioners of electrical subways, which board was charged with the responsibility of enforcing the provisions of the act of 1884 hereinbefore mentioned, and of causing to be removed from the surface and to be maintained and operated underground wherever practicable all electric wires and cables used or to be used in the business in any such city. Under this act it was contemplated that the electric light companies should build subways according to plans to be submitted to the said board of commissioners; and in case of the failure of said companies to propose or put in use a suitable plan, the commissioners were directed to devise and make a general plan such as would meet the requirements of the acts of the Legislature. In 1886 the act in question was amended in some immaterial particulars. In the said

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year the board of commissioners of subways which had been duly appointed pursuant to the act of 1885 for the purpose of carrying into effect the duties imposed upon them by that act, entered into a contract with the Consolidated Telegraph and Electric Subway Co. (the respondent) for the construction of the subways into which the overhead electric wires were to be put. In April, 1887, the said commissioners entered into another contract with said respondent whereby they agreed to provide, build, equip, maintain and operate subways according to plans and specifications furnished therefor by the commissioners of subways or their successors.

The fifth paragraph of said contract reads as follows :

The party of the second part (the respondent) may fix a fair scale of rent to be charged according to the kind of conductors and the amount of space required therefor, which shall be at the same rate to all companies making a like use of said subways ; but the scale of rentals or any charge fixed or made by the party of the second part (the respondent) shall at all times be subject to the control, modification and revision of the parties of the first part (the commissioners of subways) or their successors, and no contract shall be made between the party of the second part and any company or corporation on any terms which shall not require the payment by such other company or corporation of rents at the rate so fixed.

The tenth paragraph of said contract reads as follows :

In case any dispute shall arise between the party of the second part (the respondent) and any company occupying or desiring to occupy said subways, the same shall be referred to the party of the first part, or their successors, for settlement, whose decision shall be final.

In June, 1887, the Legislature passed an act by which the agreement made between the commissioners of subways for the city of New York and the Consolidated Telegraph and Electric Subway Company under date of July 26, 1886, as amended and modified by second and further contract or agreement between said parties dated the 7th of April, 1887, was ratified and confirmed ; subject, however, to the provisions of that act.

Section 7 of the act reads as follows :

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Sec. 7. In case, and whenever it shall be made to appear to the satisfaction of any of the justices of the Supreme Court, or any judge of the Court of Common Pleas in and for the city and county of New York, or any judge of the Superior Court of the city of New York, or to the satisfaction of either of said courts, that the said board constituted by this act, or its successors, or any officer or agent of said board or its successors, or the said The Consolidated Telegraph & Electric Subway Company or any corporation or persons claiming under the said board or its successors, or under the said company, shall have violated or shall have failed to observe and fully perform or to carry into full effect all or any of the provisions of this act or of either of the acts hereinbefore mentioned, or of the said agreement, or shall have failed to furnish just and equal facilities under this act or the said agreement to any and all corporations lawfully competent to manufacture, use or supply electricity, or to operate electrical conductors in any street, avenue or highway in the city of New York, applying for such facilities upon terms that to the court shall appear just and reasonable, then and in every such case said judge or justice or court may, by proper proceedings in the nature of a writ of *mandamus* or by *mandamus*, enforce the provisions of this act or of the acts before mentioned, or of the said agreements or of any agreements made under the said acts, or compel the granting of such facilities, or may grant such relief as may be proper in the premises. And the said board or its successors, or the mayor, aldermen and commonalty of the city of New York, or any person, company or corporation aggrieved by any such violation or failure as aforesaid, shall be entitled to institute and maintain such proceedings as are by this section authorized.

The defendant having completed a large number of miles of subways in 1888, announced a tariff which would be charged the electric light companies for the use of the subways, and in 1889 applications were made by various of the electric light companies for space in the subways for the period of one year, some of which applications contained the rental inserted therein, and in others the rental was left blank; but all the electric light companies making this application knew the scale of rent which the defendant had adopted for the use of the subways constructed by them. These applications having been granted by the defendant, and space assigned in the subways to these various electric light companies, they proceeded to put their wires therein and use the same for the purposes of their business. It further appears that these companies protested against the rates which were charged by the defendant for the use of its

subways upon the ground that they were unjust, unreasonable and not fair; and negotiations were had between the defendant and some of these electric light companies for a reduction of these rentals, such negotiations, however, being predicated upon an occupation of the subways by the electric companies for a series of years. Some slight portion of the rental thus claimed by the defendant has been paid, but for a long period of time prior to the commencement of these actions there had been a refusal upon the part of the electric light companies to pay any rent to the defendant upon the ground that the rent demanded was unfair. In October, 1890, the defendant notified the electric light companies that they were required to pay the rentals due, or else to take out and remove their cables and electrical conductors from the subways; and in case of failure to comply with the requirements of the notice upon a certain date, measures would be taken by the defendant for the removal or cutting out of both the cables and conductors belonging to the electric light companies from the subways owned by the defendant. Thereupon these actions were commenced and injunctions were obtained to restrain action upon the part of the defendant. Upon the hearing of the motion to make the injunction permanent during the pendency of the action the motion was denied, and from such denial this appeal is taken.

The plaintiffs, claiming that the rental charged by the defendant is unjust and unreasonable, have brought this action to have a fair scale of rentals determined by the court, all action upon the part of the defendant toward the collection of any rent whatever to be enjoined pending the investigation of this question.

The plaintiffs invoke the jurisdiction of the court upon the ground that the contracts hereinbefore mentioned provide that the defendant may fix a fair scale of rents; and upon the claim that section 7 of the act of 1887, above cited, provides that the electric light companies may occupy ducts in these subways upon terms that to the court may appear just and reasonable.

It seems to be clear, under the elementary principles which determine whether contractual relations have been entered into between the parties, that the application of these electric light companies for space in the subways, with knowledge of the rental which was claimed to be charged, the granting of these applications and the occupation of the subways, constituted a contract between the companies and the defendant to pay such rentals, unless there is something which is peculiar in the situation of the parties which takes their action out of the ordinary rules governing the conduct of parties to contracts. It is not necessary to cite authorities for the proposition that if A desires B to let him the use of anything which belongs to B, and he knows B's price for such occupation, and his application being granted, he enters into such occupation, it makes a contract to pay the price.

But it is said that the electric light companies, the plaintiffs in these actions, are not governed by this rule, because they were compelled to get out of the streets and go into the subways. This is undoubtedly true. This court knows, from the previous struggles of these electric light companies which have come before it to keep out of the subways and to conduct their business (notwithstanding that it had become a public nuisance) by the use of overhead wires, that it was not until they were threatened with the destruction of their business if they continued to maintain a nuisance in the streets, that they consented to occupy any portion of the subways which have been prepared for them. And it is also true that a very large part of that reluctance arose from the fact that it would necessarily be more expensive to use an artificial envelope for their conductors than to allow them to be surrounded by the open air. Having resisted the law to the very last moment, it may be that they were compelled to enter these subways rather precipitously. But for this the defendant was not responsible, and if any harsh or unfair contract was insisted upon, under the circumstances, by the defendant, the plaintiffs had their appeal, because the scale of rents or

any charge fixed or made by the defendant was at all times subject to the control, modification and revision of the board of electrical control, or their successors, and if the terms of the contract which had been entered into between the defendant and the electric light companies were of such a character as required modification, an appeal was given to the board of electrical control, and with but one exception, as far as we can see from the papers, no such rights were ever exercised.

But these parties without paying, or offering to pay, any rental whatever, have come into a court of equity to have this rental fixed, upon the ground that it is unreasonable, without any resort whatever to the tribunal which had the power to modify the terms of the contract entered into between them and the defendant.

It is a familiar principle that at least until all measures which the law gives to a party have been exhausted to restrain a wrong, equity cannot be called upon to interfere. And it may well be doubted in a case of this description where the provisions of law (because these contracts have become law by being adopted and approved by the Legislature) state that the decision of the board shall be final, whether equity can interfere unless upon proof of fraud upon the part of the board.

But it is urged that under sec. 7 of the act of 1887, to which reference has already been had, notwithstanding this provision of the contract, jurisdiction has been conferred upon the courts to determine and fix what is a fair and reasonable rental or to grant such relief as may be proper in case such jurisdiction is invoked.

An examination of the section, however, will show that the court as a court of equity has no jurisdiction conferred upon it. The whole jurisdiction conferred by that section is conferred upon a justice of the Supreme Court or a judge of the Court of Common Pleas or Superior Court or upon either of those courts to enforce in a particular way the provisions of the various acts and the various agreements under said acts and to compel the granting of such facilities,

and the granting of such relief as might be proper in the premises ; and this way pointed out is by proper proceedings in the nature of a writ of *mandamus* or by *mandamus* ; and no other jurisdiction whatever is conferred.

It is apparent that no general equity jurisdiction was intended to be conferred, because the jurisdiction conferred by this act may be exercised by a justice or a judge and need not be by the court at all. It is true that the court may act ; but the court has no power to do anything more than a judge would have the right to do out of court under the provisions of this act. And that this is the true interpretation placed upon this act is apparent from the last clause thereof, which is as follows: "And the said board or its successors, or the mayor, aldermen and commonalty of the city of New York, or any person, company or corporation aggrieved by any such violation or failure as aforesaid, shall be entitled to institute and maintain *such proceedings as are by this section authorized.*" As has been before seen, the only proceedings authorized by this section are proceedings in the nature of a writ of *mandamus*. Even though, therefore, a judge or a court might, where proceedings in the nature of a *mandamus* had been instituted, grant such relief as the circumstances required, the very wording of the section excludes all other jurisdiction upon the part of a court or judge.

Again, even if a court of equity had jurisdiction, yet it could not intervene in an action of this character because of the position of the plaintiffs. They allege that the rental is unfair, but they have entered into a contract to pay this rental, and it is clear that no matter what the jurisdiction of the court may be as to rentals accruing subsequent to the filing of a bill, they would have no power to relieve the companies from a debt which they have incurred prior to the initiation of these proceedings. They were bound to pay what was due before they could come into a court of equity and ask to be relieved from subsequent payment, even if the court had jurisdiction to entertain such an application, which we do not think it has. But in

the case at bar they offer to pay nothing, they bring no money into court, and are seeking to be relieved from a debt which they owe to these defendants, by the intervention of this court upon the theory that they made a contract which it was improvident for them to make; and that being compelled by the force of circumstances and the fear that their business might be destroyed, to make this contract, they ought not to be held to it.

We know of no rule of equity jurisprudence which justifies a court in intervening under such circumstances.

But it is claimed that even if there had been a valid agreement upon the part of the plaintiff to pay rentals at the rate charged, their failure to pay would not justify the defendant in its threatened conduct.

It is conceded that the letting of these subways is not leasing an interest in real estate, and therefore under no circumstances could a possessory action to recover possession of the space occupied by these electric light companies as real estate be maintained. And it is clear that a possessory action for the recovery of personal property will not lie, as replevin could not be had to recover a hole in the ground.

The nature of the rights conferred upon these plaintiffs by the contract which they entered into with the defendant is peculiar because of the situation of the parties and the thing leased and the purpose for which it is rented. The fact however that the thing rented can neither be considered real estate or personal estate, cannot deprive the defendant of the protection of the law in the use of its property as against one who has entered upon its enjoyment under a contract which he has wilfully violated.

As has already been stated, under these circumstances equity will not intervene because the proposed action of the defendants would at most be a trespass, the damages for which might be easily ascertained. As far as the interruption of the business of the plaintiffs is concerned, that could not be considered, because they have no right in equity to continue their business at the expense of the defendants.

The position taken by the counsel for the appellants upon the argument of this appeal was that the only remedy of the defendants was to sue for the amount of these rents ; and in case the occupants of the subways failed and the amount could not be collected upon execution, in the case of a corporation, to have the corporation dissolved, and to have a receiver occupy the subways during the pendency of the dissolution proceedings, with the right of the purchaser from the receiver to continue the occupation and so on *ad infinitum*. Such a result never could receive the sanction of law, and unless the court is pointed to some plain, well established principle which necessarily brings about such a result, it would hesitate before it interfered under such circumstances.

It might well be claimed that the rights of these defendants in reference to the occupation of their subways by the plaintiffs is similar to the right of a passenger to occupy a place in a train of a common carrier. It is well established both at common law and by statute that a common carrier has the right to eject a passenger who refuses to pay his fare. And for the same reason it would seem that when the plaintiffs refuse to pay the compensation which they agreed to pay for the occupation of these subways, the defendants would have a right to eject them from the vehicles in which they had been allowed to place their wires for the purpose of the conduct of their business. The position of the plaintiffs in the conduct of their business by means of these subways by and with the consent of the defendant, seems to be like that of a licensee. They are permitted to conduct their business through this space over which the defendant has control upon a promise to pay a certain remuneration. Failing to comply with their contract upon which the permit depended, the right to continue to conduct their business by means of these subways necessarily ended, and the defendants had a right to prevent its continuance.

We are of opinion, therefore, that a court of equity could not intervene certainly until these plaintiffs had paid

what was due before the commencement of these proceedings, and that probably the sole jurisdiction of the court is controlled by section 7 of the act of 1887, and can be invoked only in the form of the proceedings therein prescribed in a proper case.

The order should be affirmed, with costs.

BARRETT, J.: While unreservedly concurring in the result arrived at by the presiding justice in this case, and in the other cases presented at the same time I prefer to state briefly the conclusions at which I have arrived. These actions proceed upon the theory that the plaintiffs obtained access to certain allotted ducts in the defendant's subway without having made any valid or binding contract as to rent, and they ask the court to determine what would be a just and reasonable rent. In the mean time they ask us to enjoin the defendant from disturbing them, and in the end to enjoin the defendant from collecting any greater sum as rental than the sum finally adjudged in these actions to be just and reasonable. Thus, without alleging what would be a just and reasonable rent, without furnishing a particle of proof upon that head, without giving any reason for the absence of either such allegation or proof, and without tendering or even offering to bring into court any given sum deemed by them to be just and reasonable, the plaintiffs ask us to grant an injunction which will permit their continued occupancy of the allotted ducts without one penny of immediate compensation to the defendant. What, in fact, do they offer pending this litigation? Nothing whatever but a phrase. They say in their complaints that they "have always been ready and willing to pay to the defendant a fair and just and reasonable rental for these ducts." In plain terms, therefore, the plaintiffs in the name of equity invoke a positive abuse of judicial power. Having secured possession of the ducts without any contract as to rent, they boldly ask us to keep them there *pendente lite* in the full and complete enjoyment of all the rights and privileges

of tenancy, freed from any of its corresponding duties or obligations.

Upon the plaintiff's own complaint, therefore, there was not a particle of equity in the application which was denied. If there was no contract, the plaintiffs were in possession as bare licensees, and upon their refusal after due notice to remove, they became trespassers. This view of the true relation of the parties is not affected in the least by the fact that, under the legislation confirming the contract between the commissioners of electrical subways and the defendant, the plaintiffs had an undoubted right to the due allotment of necessary space in the subways. But the further claim made by the plaintiffs that such right was absolute and could not be preliminarily conditioned upon reasonable terms and regulations, is, in my judgment, preposterous. The time to settle the question of rent and all other terms was when the plaintiffs applied for space. The defendant had a perfect right, and indeed it was its duty, to refuse to permit any company to occupy the subways until the contract therefor was complete. The law is sufficiently explicit in this regard. The defendant could fix what it deemed a fair scale of rentals, and if the companies agreed to that scale, well and good. That settled the question. If, however, the companies deemed such scale to be unfair or unreasonable, an arbiter between them and the defendant was provided, namely, the board of electrical control. That board had full revisory power with regard to such rentals; and in the absence of fraud or bad faith its decision was final and binding upon both parties. It is entirely clear that the plaintiffs were bound in the first instance to appeal to this board in case the rates fixed by the defendant were deemed unreasonable. It is equally clear that the court could not revise or reverse the honest judgment of that board, and that the companies could not appeal to the court, even after an unsuccessful appeal to the board, without averring fault or bad faith. In case, however, the board should refuse or neglect to act

promptly upon the companies' appeal, a summary remedy was provided by section 7 of the act of 1887.

The object of the provisions of this latter section was to secure the granting of just and equal facilities, upon fair and reasonable terms, to all applicants alike. The plaintiffs, however, neither appealed to the board to revise the rentals fixed by the defendant, nor to the court to proceed by *mandamus* under this section 7. They simply took possession of the allotted space under written applications, some of which specified the rentals and others did not. In the latter instances it is, however, conceded that the companies were aware of the rates of rental which the defendant had fixed. I agree with the presiding justice that the facts are sufficient to establish a contract relation between the companies and the defendant as to these rentals. The plaintiffs, however, were not even then without redress. They could still appeal to the board of electrical control, which was authorized *at all times* to control, modify and revise either the scale of rentals or any fixed charges. While such appeal is afforded to them, they cannot, I repeat, appeal to the courts. Certainly not, as already pointed out, without showing fraud or bad faith on the part of the board. If, therefore, the plaintiffs are in possession without a contract, the defendant has a perfect right to treat them as licensees and to remit them to their original position as outside applicants in quest of possession. If, however, they are in possession under a contract, they must abide by its terms or seek its modification in the only manner authorized by law. They cannot come into court and ask to be upheld in their naked possession until at some future time and by means of an investigation utterly unknown to any court, whether of law or equity, "the fair thing," so to speak, between the parties has been arrived at.

With regard to the question as to whether the defendant can under any circumstances resort to the remedy of eviction. I think the plaintiffs must be held to the position assumed in their complaints. They do not admit the ten-

ancy under a completed lease, but simply claim that they are in possession under an implied agreement to give them a lease upon fair and reasonable terms to be judicially ascertained. Thus their attitude in the interim, as we have already seen, is necessarily that of licensees. They are in possession, they say, without a contract, under the right, however, which the law gives them and the duty which the law imposes upon them, to place their conductors in the subways. Still, they are there as mere licensees until a contract such as the law authorizes and even compels the defendant to impose is entered into. Upon the case made by the plaintiffs, therefore, there can be no doubt of the defendant's right to remove an apparatus which simply trespasses upon the subways. But I agree with the presiding justice, that even upon the defendant's case of a completed contract, the right exists to remove the plaintiff's apparatus for non-payment of the agreed rentals. When the nature and object of the subways are considered, it becomes apparent that the ordinary rules which govern as between landlord and tenant can have no application. The subway is a great public work authorized for a specific purpose and constructed with a view to a special service. It stands to reason that, when the conditions upon which the service is granted have been broken, such service may be discontinued and the facilities afforded by the structure withdrawn. To limit the defendant to the ordinary action to recover money, would be subversive of the entire system inaugurated. Suppose analogies with regard to possessory actions are misleading. For the defendant, though a private corporation, has here public duties to perform, duties which require that it should grant or withhold the service under reasonable rules and regulations; never of course, arbitrarily. It is, for instance, bound to supply the city of New York and each of its several departments, free of charge, with all the space necessary for their electrical conductors. It is also bound to economize the space in the subway, so that no one company shall occupy more than it actually needs to the exclusion or detriment of any

other company. It is further bound to charge the same rates to all occupants making a like use of the subways. Again, when its net annual profits exceed ten per cent. upon the actual cash capital invested by it in constructing and equipping the subways, the excess is required to be paid into the treasury of the city of New York. Then, too, the management and control of the spaces occupied by any company is subject to the rights of all other occupants, and expressly to such reasonable rules and regulations as the defendant may make. Other provisions might be adverted to, but I have specified enough to show the *quasi* public character of the duties imposed upon the defendant, and the necessity, if it is to perform its functions successfully, of regulating the space under its control in such a manner that no one non-paying company shall have the right of permanent occupancy and continuous service to the detriment not only of the city, and the defendant, but of others who are willing to pay, and who may thus be crowded out by a non-paying occupant.

I think, therefore, that payment of the agreed or fixed rentals is an essential and reasonable condition to the use of the allotted space, and that the defendant should not be interfered with in resuming possession of such space and again offering it for electrical purposes except in a case of real oppression and injustice. No such case has here been made out. On the contrary, an injunction under the circumstances disclosed would plainly be both unjust and oppressive.

I concur, therefore, for these reasons, in the affirmance of the orders appealed from.

PATTERSON, J.: I have but little to add to the opinion of the presiding justice which covers the material points discussed on the argument of this appeal. The several plaintiffs entered into the occupation of space in the conduits of the defendant under an absolute obligation to pay for their use. That they were compelled to do so by law cannot affect that obligation, for such compulsion resulted from a necessity connected with the public safety; their

business as theretofore conducted being dangerous to the community. At the time they entered into the occupation of the space referred to, they knew not only that they were required to pay, but also the rates established. Under such circumstances an implied contract arose to pay that rent unless a different one were fixed by the tribunal created by the law to regulate rentals, which, as I read the statute and the contracts, is in the first instance the board of electrical control. Even assuming that this court or a justice thereof or the judges of the Court of Common Pleas or of the Superior Court have under the seventh section of the act of 1887 a right to fix rents under any circumstances, I do not think that provision can be construed as being retroactive or as relating to any thing more than the fixing of rents after the jurisdiction has been invoked ; for it is not to be assumed that the court can control or administer this property of the defendant or interfere with past relations between it and the plaintiffs as to an adjustment of rents any more than it could between private parties who had entered into contract relations from which an implication of law would arise as to an amount of rent to be paid for the use or occupation of property ; and it is entirely immaterial how this subway may be catalogued as property, or whether the relation of landlord and tenant exists, or the defendant is to be regarded as a carrier furnishing facilities for transportation, or whether it is to receive rent *eo nomine* (which the statute distinctly provides for) or a sum of money as compensation. Whatever it may be called, the defendant is entitled to its recompense, and that is for services rendered and facilities afforded, and it is simply impossible that a construction can be given to these acts which would enable the plaintiffs to go on from year to year using the subway in their business with dilatory proceedings in courts by appeals from adjudications fixing rates, and then if they are dissatisfied, abandoning the use and leaving the defendant to nothing but mere common law actions.

I agree with the presiding justice that whatever power

the court may have over the subject is limited by the statute, but if general equity rules are applicable, the plaintiffs must put themselves in a position to show they are entitled to the consideration of a court of equity. That can be done only by securing to the defendant, either by a deposit of money or by a sufficient bond, the amount of rent which they knew was charged at the time they entered into occupation, which was either \$1,000 a mile as fixed by the defendant or \$900 a mile which seems to have been considered by the board of electrical control a proper sum. Nothing whatever has been done by either of the plaintiffs in that direction, and the court will not now make any order concerning it, for the case must be determined on the of the statute is to impose burdens on the transportation or business of both corporations, and not upon the prop-facts as they are presented in the record, and were submitted to the judge in the court below.

We are not called upon to interfere with the course of the defendant, nor to point out to either party what is the remedy for the non-payment of this rent. It is sufficient that no case has been made for the interference of the court by injunction, and if the defendant transcends its legal right in preventing the use of the subways by the plaintiffs, the latter have their adequate remedy at law.

Order affirmed, with costs.

NOTE.—See note to *U. S. Illum. Co. v. Grant*, ante. p. 95.

For decisions earlier than the foregoing five cases, in which the series of statutes designed to effect the placing underground of all electrical wires in certain cities of the State of New York were under consideration, see cases in vol. 2, referred to in note at page 210 of that volume.

The following additional cases involve a consideration of the subways acts:

In *Mary Higgins v. Manhattan Electric Light Co., Limited*, Supreme Court Chambers, March, 11, 1889, the question under consideration was the power of the board of electrical control to grant permits for the maintenance of poles and overhead wires, under the act of 1887; the case arising upon a motion to continue a preliminary injunction restraining such granting of permits. LAWRENCE, J., in his opinion upon the denial of the motion, says: "The fourth section of the latter act (L. 1887, ch. 716)

Illuminating Co. v. Telegraph and Electric Subway Co.

implies that in a case where the board is of opinion that permission should be given to erect poles and string wires overhead, keeping in view the general purpose and scope of legislation upon the subject, the construction of electrical conductors, it may grant such permission. If such is not the true construction of the act of 1887, and permission can only be granted in cases where it would be physically impracticable to lay subways, the result would be that those portions of the city which are not in the suburbs, and which are not sparsely inhabited, must be deprived in all instances of electric lights until subways can be laid. This does not seem to be the true construction of the act. The proper construction would rather appear to be that a discretionary power was intended to be vested in the board, such power to be, of course, legitimately and fairly exercised, keeping steadily in view the general purpose of placing wires underground. (Citing *People v. Squire*, 2 Am. Elec. Cas. 176.) Whether a proper case is presented for authorizing a temporary departure from the general scheme must in the first place be determined by the board, and if there be no fraud or unlawful element in the case, the court should not exercise its restraining power."

In *Postal Tel. Cable Co. v. Grant*, an injunction was asked against the sheriff of New York county, to restrain him from enforcing a warrant for the collection of an assessment levied pursuant to that portion of the statute of 1885, as amended in 1886, which provided that money to pay the salaries and expenses of the subway commissioners should be "assessed upon and collected from the several companies operating electrical conductors in any such city of the State, which, under the provisions of this act, are or shall be required to place and operate any of their conductors underground," also provided for the collection of such assessment.

The application was denied at Special Term, upon the ground, especially, that the constitutionality of the statute was in question, and the Court of Appeals, in *People v. Squire* (2 Am. Elec. Cas. 176) had intimated, though not expressly decided, that the statute was not unconstitutional in the particular urged here by the plaintiff.

The General Term (11 N. Y. Supp. 828) affirmed the judgment below, upon the ground that the plaintiff had lost its legal remedy, of *certiorari*, and had brought itself within no acknowledged head of equity jurisprudence.

AMERICAN TELEPHONE & TELEGRAPH COMPANY V.
PEARCE ET AL. (Ten cases.)

Maryland Court of Appeals, December 17, 1889.

(71 Md. 535.)

LINES ON RAILROAD RIGHT OF WAY.—RIGHTS OF ABUTTING OWNERS.—
MARYLAND TELEGRAPH STATUTE.—POST-ROADS ACT.—INJUNCTION.

A telegraph or telephone company will be restrained by injunction from constructing its lines over private property without the consent of the owner and without condemnation proceedings first had. Allegations in bill held sufficient to warrant injunction.

Whether or not the construction of a telegraph and telephone line upon a railroad right of way imposes a new burden upon the soil, not contemplated and provided for in the original condemnation proceeding, depends on whether or not the purpose of the construction is to facilitate the operation of the railroad and increase its business; a question the determination of which is not to be left to the railroad officials alone.

In the case at bar, the grants of right of way to the railroad company having been for railroad purposes only, and there being already a line of telegraph and contract for its use, sufficient for the railroad purposes, and it appearing that the contemplated line was not for such purposes, but was intended to be a part of a line for commercial purposes, held that it imposed a new servitude, and the injunction orders appealed from were affirmed.

The "post-roads acts" do not authorize telegraph companies accepting the conditions therein imposed, to go upon private property, including railroad rights of way, without permission or condemnation.

If the sections of the Maryland Code relating to telegraph companies contain any provisions depriving land owners of the right to compensation in the first instance, and requiring them to permit their land to be taken and then seek relief in action, they are unconstitutional.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Am. Un. Tel. Co.*, 1 Am. Elec. Cas. 288; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 1 Am. Elec. Cas. 260.

APPEAL from Circuit Court, Baltimore county.
Facts stated in opinion.

S. A. Williams and Robert R. Boarman, for appellant.

David G. McIntosh, for appellees.

MILLER, J.: These ten cases were argued together, and as they present substantially the same questions, they will be disposed of in one opinion. They are all bills filed by separate land owners in Baltimore county, seeking to enjoin the "American Telephone & Telegraph Company of Baltimore City," a corporation incorporated under the general corporation law of this State, from erecting telegraph poles and constructing a telegraph or telephone line of wires on and over the lands of the several complainants. Eight of the appeals are from orders granting preliminary injunctions upon the several bills. It is well settled that in deciding an appeal from such an order, this court can look only to the case made by the bill, though the defendant is required to file an answer before he can appeal, and the answer must appear in the record. *Blackburn v. Craufurd et al.*, 22 Md. 447. The question, then, is, does each of these eight several bills make out a case for the granting of such an injunction?

The bills all aver and charge, in substance, that the defendant company has recently deposited large and heavy poles upon the lands of the complainants, along the line of the Maryland Central Railroad, and is engaged in setting up said poles, or is about to do so, without their permission or consent; that the erection of these poles, and the stringing of wires thereon, is injurious to their property, and is an appropriation of private property for public use without compensation, or tender thereof, to the complainants; and that they are entitled to have the defendant restrained and enjoined from erecting said poles, and stringing wires thereon, on and over their lands, until it has acquired the right to do so by condemnation of the lands for such use, or otherwise. We have no doubt as to the sufficiency of these averments, or of the jurisdiction of a court of equity to grant an injunction in such cases. A corporation created

for the purpose of transmitting messages by telegraph or telephone is, with respect to its right to construct its lines over private property, just as much subject to the provisions of article 3, sec. 40, of the Constitution as is a railroad or any corporation clothed with the power of taking private property for public use. Lewis on Eminent Domain, sec. 172; Mills on Eminent Domain, sec. 21. This clause of the Constitution is too plain to admit of any doubt; and the averment that the defendant is proceeding, or threatens to proceed, to construct its lines of poles and wires on and over the complainants' land, without their leave or license, and without paying or tendering to them compensation for the use of their lands for this purpose is of itself enough. The court could not properly refuse an injunction, in the face of such an averment. The nature of the damage complained of, whether irreparable or not, has nothing to do with the question when thus presented. *Western Maryland Railroad Company v. Owings et al.*, 15 Md. 199. We shall therefore affirm the orders appealed from in these eight cases, without considering the question whether the appeals, or any of them, should be dismissed because of the fact that the answers of the defendant are not under its corporate seal.

In the other two cases (those of Smith and McIntosh) the appeals are from *pro forma* orders refusing to dissolve the injunctions upon bills, answers and proof. In these cases the defendant corporation, in its answers, avers that it is proceeding to construct its line of poles and wires along and on the *right of way* of the Maryland Central Railway Company, under a contract with that company, made on the 29th of April, 1889, for the use and benefit of the railway company in operating and running its cars; that the railway company has the right to place telegraph poles and wires, and telephone wires and poles, over and upon its right of way, for the use and operation of its railroad, and as many as may be necessary for operating its road, and for the safety of the public who travel over the same, for the purpose of facilitating the business of

the road, and increasing its passenger travel and freight tonnage; and that the railway company could do this themselves or employ some other company to do it for them, and the complainants have therefore no right to interfere.

These answers disclose what is obviously the real controversy in all these cases. On the one side, the land owners, from whom the railroad company obtained the *right of way* for the construction of its railroad, insist that the construction of this telegraph and telephone line will impose an *additional servitude or burden* on their lands, for which they are entitled to compensation, and that the line cannot be constructed until the corporation or corporations undertaking the construction have first complied with the requirement of the Constitution in regard to taking private property for public use. On the other hand, the telegraph and telephone company contend that they are constructing this line upon the right of way of the railroad company, under a contract with that company for its use, and to facilitate the operation of its road, and to increase its business; and in this contention they are aided by the railroad company. The right to construct this line has also been placed in argument upon other grounds, which will be noticed hereafter.

Before considering the facts, we must ascertain the law applicable to such cases; and this is not altogether free from difficulty. Not many instances have occurred in which land owners have asserted such claims, and the cases in which the precise question before us has been raised are comparatively few. In the most recent text-book on *Eminent Domain*, it is said: "A line of telegraph on a railroad right of way is an *additional burden*, unless constructed for the use of the railroad company, in the operation of its road and dispatch of its business." Lewis on Eminent Domain, sec. 141. In Mills on Eminent Domain, sec. 59, the author approvingly quotes part of the opinion of the court in *Western Union Telegraph Co. v. Rich*, 19 Kan. 517. That case, also referred to by Lewis, has been strongly

pressed upon our attention, and therefore requires a careful examination. It was a suit by a land owner against the Western Union Telegraph Company to recover damages for cutting down trees on his land. The trees were on, or close to, the right of way of the Atchison, Topeka & Santa Fe Railroad, and were cut down to make room for the telegraph poles, and to prevent interference with the telegraph wires. The defendant sought to prove that the telegraph line was built jointly by it and the railroad company, under an arrangement for its joint use by the two companies, and introduced a witness to prove that the line of telegraph was built jointly by the two companies, for the use of the railroad company in the moving of its trains and the transaction of its business; that it was part of, *and necessary to its business*, and was built on and over the right of way of the railroad company. The lower court rejected this testimony, and this ruling was held to be erroneous. This was the sole question decided, and in deciding it the court said: "A telegraph line, if not indispensable to a railroad, tends so much to facilitate its business, and to the speedy and safe running of its trains, that the railroad company has a right to build it, to use its right of way therefor, and to remove all obstructions thereon to its fullest and most uninterrupted and beneficial use. Although it may have but an easement in the land, and that easement limited to its use for railroad purposes, yet a telegraph is so convenient, if not indispensable, that it may cut down every tree and bush on the right of way, if necessary for the most constant and efficient use of a telegraph line built by it over and upon such right of way, just as it may dig away a hill or fill up a ravine for the sake of a water-tank or a station-house. By so doing, it gives the adjacent land owner no claim for damages. Such use is contemplated in the original condemnation, and the damages resulting therefrom are part of the damages included in the assessment therefor. In short, the railroad company may use its right of way not merely for its track, but for any other building or erection which reasonably tends to facilitate its

business of transporting freight and passengers, and by such use in no manner transcends the purposes and extent of the easement, or exposes itself to any claim for additional damages to the original land owner. So that, if the railroad company had built this line by itself, and independent of the defendant, and in so doing had only cut down trees upon its right of way, it is clear that the plaintiff would have no cause of action therefor. Does the fact that it took a partner in the construction and use of the telegraph expose it, or such partner, to any liability to the land owner for the full value of trees cut down upon its right of way? We think not. If the railroad company could build by itself without liability, it did not assume liability by building with another. Whatever it could do, and *would have done for its own use and benefit*, and *was so done*, was, so far as the land owner is concerned, *damnum absque injuria*, no matter who bore the expense; or, perhaps more correctly, it was damages already paid for. We do not question that every *additional burden* cast upon the land outside of the *purpose and scope of the original easement*, no matter in whose behalf, gives the land owner *new claim* for compensation; but such compensation is limited to the extent of the additional burden. Of course, if the trees were not upon the right of way, it is immaterial whether the defendant built the line alone, or jointly with the railroad company; for in the latter case, either would be responsible for the entire damages. We cannot, of course, pass upon this question of fact; for we cannot tell what the testimony, if admitted, would have disclosed. It is enough that the testimony offered ought to have been admitted, and then the jury instructed that, if the facts were as defendant sought to prove them to be, the defendant was liable for only the damages caused by the *additional burden, if any, its use of the telegraph cast upon the land.*"

We have thus quoted this opinion at length, because it is a very clear statement of the law, which we are willing to accept. It recognizes the right of the land owner to com-

pensation for every additional burden cast upon the land outside the scope of the original easement, and that whether a given structure creates an additional servitude is a *question of fact*, depending on the circumstances in each case, to be determined by the tribunal having jurisdiction to try the same, and before which it is tried. We cannot adopt the view taken by counsel for the appellant, that this question must in all cases be determined by the judgment and opinions of the railroad officials or employees. In a case where the question was whether a certain building was a necessary building, within the terms of a railroad charter, that question was determined by this court itself, upon proof as to the character of the building, its location, and the purposes for which it was constructed and used. *Hamilton v. Annapolis & Elk Ridge R. R. Co.*, 1 Md. 560. We entertain no doubt whatever as to the right of a railroad company to construct on and over its right of way a telegraph or telephone line, for its use in the operation of its road and dispatch of its business; and it may do this by itself, or may employ another company to do it, or may do it conjointly with another company. If, then, this line is in process of construction, or is about to be constructed, over the right of way of this railway company, in good faith, for the use and benefit of the latter in the operation of its road, and to facilitate its business, or is reasonably necessary for that purpose, the land owners have no ground of complaint, because such use of their land is within the scope of the original easement, for which they have already received compensation. But, on the other hand, if this is not the motive for its construction, and the main object in constructing it is to establish an extensive line of telegraph and telephone communication through this and other States, for general commercial purposes, for the use and benefit of the defendant, and such a line is not reasonably necessary for the purposes of the railroad, then it will be a new easement, and put a new and additional burden upon the land, for which the owners are entitled to compensation. This question will be decided when we come to

consider the facts ; but we must first notice the other grounds upon which the right to construct this line is sought to be placed.

By an act of Congress approved July 24, 1866 (U. S. Rev. Stat., sec. 5263), it is provided, among other things, that

Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph over and along any of the military or *post-roads* of the United States which have been, or may hereafter be, declared such by law ; " *provided* such lines shall not be so constructed as to interfere with the ordinary travel on such roads ; and *provided*, also, " that, before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by this act.

Congress afterwards, in 1872, declared all the railroads in the country which are now or may hereafter be in operation to be "*post-roads*." There is nothing in these records to show that the defendant has filed its acceptance of the act of 1866 ; but, as this can be readily done, it is proper we should give our views of the construction and effect of these statutes. We cannot suppose it was the intention of Congress, by these enactments, even if it had the power to do so, to put the right of way of every railroad in the country at the mercy of the telegraph companies, and allow the latter to use them, for the construction of their lines, without making compensation to any one therefor. Such a construction was wholly repudiated by Judge DRUMMOND in the case of *Atl. & Pacific Telegraph Co. v. Chic., Rock Isl. & Pacific Railroad Co.*, 6 Biss. 158, and by Judge HARLAN in *Western Union Telegraph Co. v. Am. Un. Telegraph Co.*, 9 Biss. 72. In the latter case, it is expressly said that under this act the telegraph companies must obtain the consent of the owners of the right of way, or condemn the same *for telegraph purposes*, and make compensation therefor. We have not been able to discover that the views of these judges on this point have ever been

overruled by the Supreme Court in any of its numerous decisions on this statute. On the contrary, in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, that court said this act "gives no foreign corporation the right to enter upon private property without the consent of the owner, and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges;" and, again, "no question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty, under the Constitution, is not interfered with. Only national privileges are granted." In all the cases in the Supreme Court where telegraph companies have constructed their lines on the right of way of railroad companies in the States, they appear to have done so by consent, or under agreement with such companies, and in none of them has the question as to the right of the land owner to compensation for the additional burden thereby cast upon his land arisen. We have always understood that the right of way of a railroad chartered by and running through a State is the private property of the railroad corporation, and that the land through which it runs, subject to the easement for the railroad, is the private property of the respective land owners; and we cannot understand how Congress, by declaring such road to be a post-road, can deprive either the railroad corporation or the land owners of these property rights, or how it can confiscate them for the benefit of telegraph companies, nor do we think it was the intention of Congress by these enactments to do any such thing. Whatever may be their effect in other respects, we think it clear they are not

susceptible of the construction, and have not the effect sought to be given them by counsel for the appellant. In our judgment, they do not give a telegraph company, when it proceeds to construct its lines over a railroad right of way, immunity from the restriction by which the Constitutions of all the States, as well as of the United States, have carefully protected the owners of private property, when taken by the exercise of the power of eminent domain. In our opinion, therefore, these acts give no aid to the defendant in regard to the question now before us, and much less does the subsequent act, approved June 23, 1879, which is also relied on. This latter act is the appropriation bill for the support of the army for the fiscal year ending June 30, 1880, and, in a paragraph making an appropriation for the cost of telegrams and for other purposes, a clause is interjected which declares that "telegrams are authorized to be transmitted by railroad companies which may have telegraph lines, and which shall have filed their written acceptance" of the act of 1866, "for the government and for the general public, at rates to be fixed by the government." It is obvious this clause has no bearing on the question now under consideration.

Again, it is contended that the defendant is empowered to construct this line by the statute law of this State, and cannot be restrained from doing so by injunction, but for any damage done to private property thereby the owners must seek redress by an action at law. For this position, reference is made to the sections of the Code relating to telegraph companies. Code, art. 23, secs. 222-226. All that need be said in regard to these sections is that, if they contain any provision authorizing the construction of telegraph lines on and over private property in the *first instance* and then requiring the property owners to seek compensation *afterwards* by an action at law for damages, it is in conflict with the constitutional provision referred to, which requires the just compensation agreed upon or awarded by a jury to be "*first* paid or tendered;" that is, *before the property is taken*. This provision of the Constitution is,

of course, controlling; and that it applies to the case of property taken for the construction of telegraph lines there can, we think, be no reasonable doubt, for we regard it as now well settled that use of property for this purpose is a "public use." "A telegraph or telephone line," says Lewis, "designed for the service of the public, and subject to regulation by the Legislature, is a public use for which property may be taken." Lewis on Eminent Domain, sec. 172. "The term 'public use,'" says Mills, "is flexible and cannot be confined to the public use known at the time of the framing of the Constitution. All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain. Any use of anything which will satisfy a reasonable public demand for facilities for travel, for transmission of intelligence, or of commodities * * * would be a public use." Mills on Eminent Domain, sec. 21. The good sense of this proposition commends it to our approval, and we adopt it. Casting an additional burden, for such a purpose, on land already subject to an easement, is just as much taking it for public use as was the taking of it for the original easement; and, as we have shown, courts of equity have in this State jurisdiction to prevent by injunction the prosecution of the work until the compensation is paid or tendered. The injunction does not, of course, prohibit the construction of the work, but only suspends it till this provision of the Constitution has been complied with.

We must now examine the facts disclosed by the records in these two cases, for the purpose of deciding the question above stated.

The Maryland Central Railway Company is a recent successor to all the property rights and franchises of the Baltimore & Delta Railway Company, a corporation formed under the act of 1878, c. 195, by the consolidation of two other companies, the elder of which was incorporated by the act of 1868, c. 314. It has also acquired the property and franchises of the Maryland Central Railroad Company, which was incorporated by the act of 1867,

c. 121. Its road is a *single track, narrow gauge* railroad, running through Baltimore and Harford counties, from Baltimore city to the village of Delta, in Pennsylvania, close to the Maryland line—a distance of forty-five miles—which was not completed and open for traffic, throughout its entire length, until the 21st of January, 1884. Three grants of right of way through complainants' lands were made in 1878 and 1879, and embrace strips of varying width, one being sixty-six, one forty and the other thirty feet. All the grants express that the land is to be used "for railroad purposes only," and the company could have acquired it for no other purpose by condemnation.

At the time the road was completed, it had a line of telegraph poles, with one wire thereon, which had been constructed by Augustus G. Davis, under a contract with the company dated the 8th of August, 1883. By this contract, Davis agreed to construct and maintain, at his own cost, a first-class telegraph line "along the right of way from Baltimore to Delta," the poles to be 35 feet in height, and to have thereon, "for the exclusive use" of the company, one No. 9 galvanized wire, and "to furnish one set of telegraph instruments, at every railroad station on the line," as the company may direct, and where it may have a station agent or operator, and a station-house. The company, on its part, agreed, among other things, to permit its operators to transact commercial telegraphic business on this line "until such time as the *business demands or necessities*" of the company "may require the *exclusive use of said wire*," at which time Davis agreed "to furnish another or other wire or wires *for such business*." He was also to receive the entire receipts from "commercial business for five years, and to have the right to place on the poles, at his own cost, as many wires for *telephone, telegraph or other purposes* as he may require," provided he did not overburden the poles, "or render them unsafe for the wire or wires" of the company. It was also agreed that at stations where the company has no operators, and

Davis had "an operator or *telephones*," the company shall have "free use of the same, or *either of the same*, for railroad purposes or business." It was also agreed that the wire or wires designated as above for the use of the company should connect, not only with its North Avenue station, in Baltimore, but with such city offices as Davis may establish, he to deliver, free of charge, in the city, all messages relating to railroad business. The contract was to continue for 10 years, with the privilege to the company of continuing it for another 10 years, or of discontinuing it, at its election; but, if discontinued at any time, the company was bound to purchase the line of poles, wires and instruments used for its railroad business at a valuation to be fixed by arbitrators. Finally, it was agreed that the company should have the privilege, "at its own expense, of placing an additional wire upon said poles, for its own exclusive railroad business." With this line thus built by Davis, and with the *single wire* thereon, the railway company has *managed the running of its trains*, and conducted all the telegraphic communication necessary for its business since its road was completed to the present time. That line still exists, *is still in operation*, performing all the necessary work of the company, and has, with all its appurtenances and instruments, been assigned and transferred to the railroad company by the contract recently made with the defendant. There was and is no mechanical difficulty whatever in putting on these poles as *many wires* as the company may ever need for its business purposes; and its *financial inability* to do so, or to employ telegraph operators at all its stations, has nothing to do with the question we are to decide.

This was the state of things when the defendant company intervened. It took out its Maryland charter on the 19th of March, 1889, and on the 19th of April following made the contract with the railway company. By this the Davis contract is annulled, and the railway company grants to the defendant the right, at its own cost, "*to erect, maintain and operate a telegraph and telephone line* upon, over

and along the line of railway of said railway company between the city of Baltimore and the village of Delta, and along, upon and over one side solely and only of the right of way." By the other clauses of this contract there is, so far as we can discover, after a careful examination of them, *not a single substantial privilege* granted to the railway company which it did not have under the Davis contract.

Shortly after the execution of this contract the defendant commenced placing on and erecting along this right of way, for the purpose of constructing its line, pine and cedar poles brought from Canada, which are long, heavy and large, varying in diameter from thirteen to nineteen inches. These poles, whenever put up, have arms ten feet in length for the support of wires, and are notched for a number of other similar arms. It is obvious that a structure of this character, and thus equipped, is not being put up in order to subserve or promote the business purposes of *this railroad*, and in no sense of the term can it be regarded as necessary, or reasonably necessary, therefor. The bills charge that the corporate body called "The American Telegraph & Telephone Company" is organized for the purpose of establishing lines of communication, at long distances, by telegraph and telephone, and proposes to do business between the city of New York and the cities south of it. This charge is not denied by the answers; and that such is the design of those engaged in the prosecution of this enterprise, and that the line over the right of way of this railroad is to be but a link in the chain of such communication, we have no doubt. This is shown by the character of the structure proposed to be built; by the testimony showing who are the incorporators in the Maryland charter, and who own its stock, as well as by the terms of the contract itself made with the railway company; and, still more conclusively, by the fact, testified to by one of the witnesses, that the line has left the railroad at Forrest Hill before reaching its Delta terminus, and is being constructed towards another town in Pennsylvania.

We think it clear that no intelligent person can read these records without coming to the same conclusion. Whether it be true or not that a railroad can be better managed, as to the running of its trains, by the telephone than the telegraph, the Davis contract provided for the use of telephones, and gave the railway company the *free use* of them whenever they were used by Davis. Again, assuming that this telegraph and *telephone* line would be a *convenience* to the railway company, and save it *some expense*, still, convenience and saving of expense do not meet the requirements of the law, as we have stated it, on the question before us.

We have thus considered the facts and circumstances of these cases, and find and decide that the construction of this new and additional line will impose a new servitude on the land of these complainants, and shall therefore affirm the orders appealed from.

Several other questions are presented by the briefs of counsel, and have been, to some extent, argued by counsel; but the views we have expressed render it unnecessary to notice them at length. It is proper, however, to say that if any of the poles of this line, as erected, infringe upon the lands of the complainants, outside of the railroad right of way, or if any of them have been guyed or stayed by wires fastened to trees standing on such land, outside of such right of way, these facts, of themselves, would entitle the complainants to an injunction.

Orders affirmed and causes remanded.

STONE, J., dissented.

NOTE.— This case is cited and followed in *Chesapeake & Potomac Teleph. Co., post*.

That a telegraph line may be erected along a railroad right of way, for the convenience of the railroad in the transaction of its business, without imposing a new servitude upon the land condemned for railroad purposes, was held in *W. U. Tel. Co. v. Rich* (Ind.), 1 Am. Elec. Cas. 271, and in *Prather v. W. U. Tel. Co.* (Ind.), id. 863, note.

Telegraph Co. v. Williams.

The converse of that proposition is decided in the above case; that if the proposed line is not for railway purposes a new servitude is imposed. See note to this and previous volumes, title "Post-roads Act." See note to *Detroit City Ry. Co. v. Mills*, post.

WESTERN UNION TELEGRAPH COMPANY V. — WILLIAMS.

Supreme Court of Appeals of Virginia, March 27, 1890.

(86 Va. 696.)

POLES AND WIRES IN HIGHWAY.—ABUTTING OWNERS.—CONSTITUTIONAL LAW.

The erection of poles and stringing of wires thereon for telegraph purposes imposes a new burden, for which the abutting owner, in whom is the title to the soil of the highway subject to the easement for public travel, must be compensated; and Virginia Code, secs. 128, 129, which authorizes the maintenance of telegraph lines in highways, so long as the same are not obstructed, but fails to provide for compensation to the abutting owners, is in the latter respect unconstitutional and void.

Cases of this series cited in the prevailing opinion: *Broome v. N. Y. & N. J. Teleph. Co.*, vol. 2, p. 259; *Board of Trade Tel. Co. v. Barnett*, vol. 1, p. 265; *S. W. Ry. Co. v. So. & Atl. Tel. Co.*, vol. 1, p. 82; *W. U. Tel. Co. v. Rich*, vol. 1, p. 271.

ACTION of trespass. Appeal by defendant below.
Facts indicated in head note and stated in opinion.

Staples & Munford and *Robert Stiles*, for the plaintiff in error.

Pollard & Sands, *R. T. Lacy* and *W. W. Gordon*, for the defendant in error.

LACY, J., delivered the opinion of the court: This is a writ of error to a judgment of the Circuit Court of New Kent county, rendered on the 30th day of October, 1888.

The plaintiff in error constructed its telegraph lines upon the county road in New Kent county, where the said road ran over the lands of the defendant in error, without his consent, and without condemnation proceedings, and without tendering compensation, and refusing to pay compensation therefor. As is alleged in the declaration, the defendant, "against the will of the plaintiff, and violently, against the protest of the plaintiff, entered upon the said lands and cut down, and destroyed the trees and underwood—fifty pine trees, twenty oak trees, and other trees, of the value of \$1,950—and broke down and prostrated a great part of the fences of said plaintiff, and dug holes in the land of the plaintiff, and put posts there and kept the same there, etc., and encumbered the lands and hindered the plaintiff in the free use and enjoyment thereof." The defendant pleaded not guilty, and moved the court to remove the case to the Federal Court, which motion to remove the case the court overruled, and the case proceeded to a trial; and upon the trial the jury rendered a verdict in favor of the plaintiff for the sum of \$550, upon which judgment was rendered accordingly. Whereupon the defendant, the plaintiff in error here, applied for and obtained a writ of error to this court.

There were sundry exceptions taken at the trial which were assigned as error here. The first assignment which we will consider is as to the refusal of the court to give to the jury certain instructions asked by the defendant, and the giving by the court of certain other instructions. The plaintiff moved the court to instruct the jury to the following effect: That "if the jury believe from the evidence that the defendant was, at the time of the committing of the alleged trespass in the declaration mentioned, and still is, a telegraph company chartered by this or any other State, and that the road along which it has constructed and maintained, and still is maintaining, its telegraph line in the county of New Kent, was at said time, and still is, a county road, then the said defendant had at said time, and still has, the right to construct and maintain its said

line along said county road, upon any part thereof, to the width or extent of 30 feet (whether the road bed actually used by the public was and is of such width or not) provided the ordinary use of said road be not thereby obstructed; and said defendant had at said time, and still has, the right to cut down and trim out such trees or limbs within such width or extent of thirty feet, as might interfere with the proper and effective construction, maintenance, and operation of its said line. (2) For the exercise of such right as aforesaid, the defendant is not required to obtain permission from, or to make compensation to the owner or owners of the land upon which said road is located (whether the fee simple title to the soil upon which the road is located, or the mere easement thereon, be vested in the public). (3) The jury are further instructed that, although the road bed of said road actually used by the public may not be or have been of the width of 30 feet, and although the overseer of said road may not have complied with the law in keeping said road clear and smooth, and free from obstructions, to the legally required width of 30 feet, yet, under the laws and statutes of the Commonwealth, the defendant company was authorized to use any part of said legal road of 30 feet to the same extent as if said overseer had strictly complied with the provisions of law requiring him to keep said road clear of timber and other obstructions to the required width, and the whole 30 feet been actually used by the public as a road."

But the court refused to give these instructions of the defendant, and gave the following: "(1) The court instructs the jury that the law presumes that the ownership of lands along the side of a public road in Virginia extends to the middle of said road, and the burden of proof is upon the party who claims otherwise to show that such is not the case along the road where the right is controverted; and the owner has the exclusive right to the soil, subject to its use for the purposes of the public, and to the right of passage of the public over the same; and, being owners of the soil, they have a right to all of the ordinary remedies for dis-

turbing of, or injury to, their freehold or possession; and any act of the Legislature which divests such owners of their rights is unconstitutional and void. (2) The fact that a road is a public road or highway does not authorize the digging of holes for the purpose of erecting telegraph posts, and the erecting of posts, and the establishing a telegraph line, over the lands of a person, without his consent, although the same may be erected or done on that part of his premises which is used as a public road." It thus appears that the claim of the defendant is that, by reason of the act of Assembly of February 10, 1880 (acts 1879-80, pp. 53, 54), it was authorized to construct its telegraph poles and lines along the lands over which the county road runs, without making compensation therefor, and that it maintains its right to exercise, as to these lands, the right of eminent domain therein, to take and enjoy what belongs another, in the exercise of the sovereign power, not only without making any compensation therefor, but without any formal proceedings looking to condemnation of this property under any of the forms of law whatever.

If it is once conceded, or anywise established, that the land in question belonged to the plaintiff, it was his private property, his freehold, as entirely his own, throughout all its parts, as the shelter which he had erected around and over his hearthstone, for his habitation and home, and as entirely under the protection of the laws against the intrusion as the very hearthstone itself. That these lands are the lands of the plaintiff, unless he has lost them by the creation of a public road across them, is undeniable, is, indeed, not denied. Does the creation of a public road through the land divest him of the fee in the same?

As to the extent of the right acquired by the public upon opening a highway in Virginia, Mr. Minor, in his institutes (volume 1, p. 120), says: "The public acquires merely a right of passage. The freehold and all the profits of the soil (that is, trees, mines, etc.) belong still to the proprietor from whom the right of passage was acquired. He may, therefore, recover the freehold in ejectment, subject to the

right of way, and may maintain an action of trespass for digging the ground. If it be unknown from which of two adjacent proprietors a highway was at first taken, or if the highway be the boundary between them, they are understood to own each *ad medium flum viæ*." Citing Bac. Abr. Highways (b), *Bolling v. Mayor of Petersburg*, 3 Rand. 563; *Home v. Richards*, 4 Call, 441; *Harris v. Elliott*, 10 Pet. 25. And this subject is again referred to by Mr. Minor in his second volume, p. 20, as to the ownership of land adjacent to highways, when he says: "The ownership usually extends to the middle of the road, as in the case of a private stream; or, if the same party owns on both sides, the whole road belongs to him, subject to the public easement of the right of passage in either case." Citing 3 Kent Comm. 432. In the case of *Home v. Richards*, *supra*, all the judges delivered opinions, and all held that the grant of a right of way does not convey the soil, but only the right to a way over. In the case of *Bolling v. Mayor of Petersburg*, *supra*, a case fully and ably argued in this court by the foremost lawyers of that day, Judge CARR delivered the unanimous opinion of the court. Speaking as to the public highway, he said: "Does this disable the demandant from recovering the land? It certainly would not, in England, as many cases show." Citing *Lade v. Shepherd*, 2 Strange, 1004. In that case the defendant rested one end of a bridge upon the highway. Upon trespass brought, the court said: "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage; but it never was understood to transfer the absolute property in the soil." In *Goodtitle v. Alker*, 1 Burrows, 143, in ejectment, a special verdict finding that the land was a public street and public highway, Lord MANSFIELD says: "1 Rolle, Abr. 392, is express that the king has nothing but the passage for himself and his people, but the freehold, and all the profits, belong to the owner of the soil. So do all the trees upon it, and mines under it. The owner may get his soil discharged of this servitude or easement of a way over it by a writ of *ad*

quod damnum. It is like the property in a market or fair. There is no reason why he should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement. An action of trespass would lie for an injury done to it. I see no reason why the owner may not bring ejectment as well as trespass." *Mayor, etc. v. Ward*, 1 Wils. 107; *Harrison v. Parker*, 6 East, 154. But it is said that in this country we act on a more liberal scale; that the court will look to the great principles of public policy, and give them effect; that the conveniences of the community requiring highways, they must be had; and, as a mere right of way is not sufficient for the full enjoyment of them, we must consider the Commonwealth as vested with a base fee in all public highways.

Our business is with the law as it is, and, where the power to be exercised is one of so important a character as the taking away the property of the citizen, divesting him of his eminent domain in the soil, I could not consent to take the step unless I saw myself justified by some clear principle of the common law, or some plain enactment of the statute. The English cases are pretty strong evidence that the common law confers no such power. I have looked into our statutes, and I can find nothing there to countenance the idea that where a road is established the fee in the soil, either simple or base, is vested in the Commonwealth. On the contrary, I think it is obvious that a right of way is all that the public requires, leaving the whole fee in the owner of the soil. It is for this use of the land by the Commonwealth that the owner is compensated. There can be no question as to what the law is in this State. It is well settled. *Warwick v. Mayo*, 15 Grat. 528, Judge ALLEN delivered the unanimous opinion of this court to the same effect. Speaking of a highway, he says: "The easement comprehends no interest in the soil," and cites Judge SWIFT as saying, in *Peck v. Smith*, 1 Conn. R. 103: "The right of freehold is not touched by establishing a highway, but continues in the original owner of the land in the same manner as it was before the highway was established, sub-

ject to the easement." He says further: "Notwithstanding the easement, the owner retains many and valuable interests. * * * He may make any use of it not inconsistent with the enjoyment of the easement." Hare & Wallace's notes to *Dovaston v. Payne*, 2 Smith Leading Cases, 190, where the authorities are collected. After speaking of the English rule, and the decisions of some of the States, he says: "In Virginia the rule has been established by an authoritative decision upon the very point in accordance with the doctrine of the English courts," and refers to *Bolling v. Mayor of Petersburg*, *supra*. If these principles are thus settled in Virginia, as they certainly are, they are equally as firmly imbedded in the jurisprudence of numerous other States of this country. These are collected and cited by Mr. Angell in his work on Highways, p. 396, sec. 301 *et seq.*, and notes. At page 398, sec. 303, this author says: "The principles of the common law in this respect have been recognized and adopted by the American courts," citing *Perley v. Chandler*, 6 Mass. 454. Under these principles the plaintiff was entitled to maintain trespass against the defendant when the said defendant stopped upon his land, instead of passing along, and dug up his soil, and cut down his trees, and tore down and scattered his fence unless such taking of his property was by due process of law, for public uses, upon just compensation. If the use for which the land was taken was a private use, it could not be lawfully taken without his consent. But the use may be conceded to be a public use, and yet to take without just compensation was unlawful. Such taking without authority of law was a trespass, and such taking could find no justification in any act of the General Assembly. (Art. 5, sec. 14, Const. of Va.) It is claimed that the act of Assembly passed February 10, 1880 (acts 1879-80), authorized this company to so construct its works upon the land of the plaintiff. That act should receive a reasonable construction, and be so constructed, if possible, as to avoid repugnance to the Constitution. And, while by that act, these companies are authorized to construct their lines and

fixtures along the county roads, provided the ordinary use of the road was not obstructed, it is not expressly provided that this may be done without compensation. But the provision is so as not to obstruct the ordinary use. The Commonwealth had and has in these roads nothing but the use to pass over and along, and the act provides that this use shall not be obstructed by virtue of that act. But at the conclusion of this paragraph, constituting the last words in it, are these words, "*upon making just compensation therefor*;" and then follow the provisions of the law which provide for the proceedings necessary to ascertain what is just compensation by condemnation proceedings. This was certainly the provision of the act as to lands of persons generally; and, if the land upon which the highway runs is the private property of the citizen, which it clearly is, should not this language be held to apply to such land as well as to others? Why not? The Commonwealth has no more power to grant the one than the other. To grant either is to take private property, and this can only be done upon just compensation. If this is the true construction of this act, the same is in accordance with the Constitution of the State; and the plaintiff was entitled to maintain his suit against a corporation which neither took lawfully, nor paid a just compensation. But if the act does provide for the taking of this private property without compensation, then it is void for repugnancy to the Constitution of the State, and the plaintiff was entitled to recover, and the instruction of the court was right.

However, it is claimed by the plaintiff in error that, granting that the rights of the plaintiff are what we have stated, and the Commonwealth has only the right to use by going over, still his case is good, because his works are only a use of the easement and constitute no new taking — no additional servitude. We will now briefly consider this argument.

The right in the Commonwealth is to use by going along over. This is the extent of the right. If the right was

granted to the defendant to go over simply to carry its messages, then the right granted was in existence before the grant, and the right to go over is not only not disputed, but distinctly admitted. This is the servitude over the land fixed upon it by law, and the whole extent of it. If anything more is taken, it is an additional servitude, and is a taking of the property, within the meaning of the Constitution. To take the whole subject, the land in fee, is a taking. This, however, is the meaning of the term only in a limited sense, and in the narrowest sense of the word. The constitutional provision which declares that property shall not be taken for public use without just compensation was intended to establish this principle beyond legislative control, and it is not necessary that property should be absolutely taken, in the sense of completely taking, to bring a case within the protection of the Constitution. As was said by a learned justice of the Supreme Court of the United States: "It would be a curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely: can inflict irreparable and permanent injury to any extent; can in effect subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws and

practices of our ancestors." Justice MILLER in *Pumpelly v. Green Bay Company*, 13 Wall, 166.

It is obvious, and it is so held in many cases, that the construction of a railroad upon a highway is an additional servitude upon the land, for which the owner is entitled to additional compensation. *Cooley's Constitutional Limitations*, 548; *Ford v. Chicago & Northwestern R. R. Co.*, 14 Wis. 616; *Pomeroy v. Chicago & M. R. R. Co.*, 16 Wis. 640. And the power of the Legislature to authorize a railroad to be constructed on a common highway is denied upon the ground that the original appropriation permitted the taking for the purposes of a common highway, and no other. The principle is the same when the land is taken for any other purpose distinct from the original purpose, and the reasoning in the two cases is applicable to each. In the case of *Imlay v. Union Branch R. R. Co.*, 26 Conn. 255, it is said: "When land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby convertible into a common. As the property is [not taken, but the use, only, the right of the public is limited to the use, the specific use, for which the proprietor has been divested of a complete dominion over his own estate. These are propositions which are no longer open to discussion." *Nicholson v. N. Y. & N. H. R. R. Co.* 22 Conn. 85; *South Carolina R. R. Co. v. Stiener*, 44 Ga. 546. In the case of a telephone company, the chancellor, in the case of *Broome v. New York & New Jersey Telephone Co.*, 5 Central Rep. 814, held that, in order to justify a telephone company in setting up poles in the highway, it must show that it has acquired the right to do so, either by consent or condemnation, from the owner of the soil, saying: "The complainant seeks relief against an invasion of his proprietary right to his land. The defendant, a telephone company, without any leave or license from, or consent by, him, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation, or any steps to that

end, set up their poles upon his land." What has been said is sufficient of itself to establish the right of the complainants to relief; for, in order to justify the defendant in setting up the poles, it is necessary for it to show that it has acquired the right to do so, either by consent or condemnation, from the owner of the soil. As to these rights of the owner of the soil, see American and English Encyclopædia of Law, vol. 9, title "Highways," VII. sec. 2; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 508; *South Western R. R. Co. v. Southern & A. Tel. Co.*, 46 Ga. 43; *Western Union Tel. Co. v. Rich*, 19 Kansas 517; *Willis v. Erie Tel. Co.*, 34 N. W. Rep. 337.

That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle, in the light of the Virginia cases cited above. If the right acquired by the Commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil, is to dig up his soil; to cut down the trees, is to cut down his trees; to destroy the fences, is to destroy his fences; to erect any structure, to affix any pole, or put in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of his property. If the Commonwealth took this without just compensation, it would be a violation of the Constitution. The Commonwealth cannot constitutionally grant it to another.

It is true that the use of the telegraph company is a public use; that company is a public corporation, as to which the public has rights which the law will enforce. But these public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally; it is for the private profit of the corporation. It is its business enterprise, engaged in for gain. Its services can only be obtained upon their being paid for. There is no reason, either in law or in common justice, why it should not pay for what it needs in the prosecution of

its business. Upon this burden being placed upon it, it can complain of no hardship; it is the common lot of all. If the said company has use for the private property of a citizen of this Commonwealth, and it is of advantage to it to have the same, it is illogical to argue that the property is of small value to the plaintiff, and, in the aggregate, a great matter to the plaintiff in error. This argument is not worth considering; it cuts at the very root of the rights of property. It would apply with equal force to all the transactions of life. It is sufficient to say the ægis of the Constitution is over this as over all other private property rights, and there is no power which can divest it without just compensation.

We think the instructions of the Circuit Court were clearly right, and there is no error therein.

* * * * *

JUDGMENT AFFIRMED.

FAUNTLEROY and HINTON, JJ., concurring.

NOTE.—LEWIS, P., wrote an elaborate dissenting opinion, the burden of which was that (following *Pierce v. Drew*, 136 Mass. 75, 1 Am. Elec. Cas. 571; and *Julia Building Association v. Bell Teleph. Co.*, 88 Mo. 258, 1 Am. Elec. Cas. 801); “an additional servitude is not imposed by the erection on a public highway of a telegraph or telephone line under a statute of the State, and that such statute is not unconstitutional because it makes no provision for additional compensation to the owners of the fee in the highway.” In this RICHARDSON, J., concurred.

This case is cited in *Chesapeake & Potomac Teleph. Co. v. Maehensie*, *post*, as authority for the proposition above stated.

See note to *Detroit City Ry. Co. v. Mills*, *post*.

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF
BALTIMORE CITY v. LUCY T. MACKENZIE, by her next
friend, George N. Mackenzie.

Maryland Court of Appeals, March 24, 1891.

(74 Md. 36.)

POLES IN STREET.—ABUTTING OWNER.—DAMAGES.

Whether the abutting owner be the owner of the fee of the street or not, his right to use the street as a means of egress and ingress cannot, even under legislative and municipal sanction, be unreasonably abridged; and an action will lie in his favor against the usurper of such rights.

The above rule applied in an action against a telephone company for damages resulting to plaintiff's warehouse by the erection of a telephone pole in the street adjoining her premises.

The rule of damages in such cases stated.

Cases of this series cited in opinion: *Am. Teleph. & Tel. Co. v. Peares*, vol. 3, p. 169; *W. U. Tel. Co. v. Williams*, vol. 3, p. 184; *Broome v. N. Y. & N. J. Teleph. Co.*, vol. 2, p. 259.

APPEAL by defendant below from a judgment rendered by Baltimore Court of Common Pleas.

Facts stated in opinion.

Argued before ALVEY, C. J., MILLER, IRVING, BRYAN and McSHERRY, JJ.

Charles J. M. Gwinn, for the appellant.

George Norbury Mackenzie and *John V. L. Findlay*, for the appellee.

McSHERRY, J., delivered the opinion of the court: The declaration in this case alleges "that the plaintiff is possessed of a lot of ground, with the improvements thereon, being valuable warehouse property, known as No. 22 South Charles street, and while so possessed the defendant, with-

out her authority or consent, and without making or offering to make compensation therefor, planted a large and unsightly pole in the footway, in front of said premises, which obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of the said premises, and, though repeatedly notified to remove the said pole, refuses so to do, although a reasonable time for the removal of the same has elapsed," etc. There is added an application for an injunction under sec. 117 of art. 75 of the Code. The defendant filed three pleas. The second was the plea of not guilty, and the first and third are as follows, viz. : "That the defendant, at the time of the alleged trespass, was duly incorporated as a telephone company under the laws of the State of Maryland, and was entitled as a corporation so formed, in the prosecution of its business, and for the purpose thereof, to erect and maintain the pole upon the footway of South Charles street in the City of Baltimore, in front of the warehouse of the plaintiff, complained of in the declaration of the plaintiff, without making, or offering to make, compensation therefor to the plaintiff; and that the alleged trespass complained of in the declaration of the plaintiff was a use by the defendant of its said right." Third: "That the plaintiff ought not further to have or maintain her aforesaid action against it, because it says that by a certain ordinance of the mayor and city council of Baltimore, approved on the 9th day of May, in the year 1889, and since the institution of the suit in this cause, it, the said defendant, was and is authorized to maintain its said pole in and upon the footway of South Charles street, in the city of Baltimore, in front of the warehouse of the plaintiff complained of in the declaration of the plaintiff, for the period of two years after the said date of the approval of said ordinance, and so long as said pole is necessary to be maintained by the defendant, for the purpose of making distribution of and forming connections between any wire or wires forming part of the underground wire cables authorized by said ordinance to be laid within the limits of the city of Balti-

more." To these pleas—the first and third—the plaintiff demurred, and the court of common pleas sustained the demurrer.

[The discussion of and decision as to certain local questions of practice are here omitted.]

We now come to the consideration of the ruling of the court sustaining the demurrer to the first and third pleas filed by the defendant. These pleas present some of the principal questions discussed in the argument at the bar. They rely, as a defense to the action, upon an authority which the appellant claims to have under the Code, and under an ordinance of the mayor and city council of Baltimore, to plant, in its present position, the pole complained of, without making, or offering to make, compensation to the appellee. By sections 224 and 232 of article 23 of the Code, telegraph and telephone companies, incorporated under the general corporation law of this State, are empowered to construct their lines along and upon any postal roads, and postal routes, roads, streets and highways, provided their fixtures, posts and wires do not "interfere with the convenience of any land owner more than is unavoidable." It is expressly provided in section 224 that "the said corporation shall be responsible for any damages which any person or corporation may sustain by the erection, continuance and use of such fixtures." It is further provided that in any action brought for the recovery of damages, the company may elect to have included the damages for allowing the said fixtures permanently to continue. The following proviso is then added: "Provided, that no person or body politic shall be entitled to sue for or recover damages, as aforesaid, until the said corporation, after due notice, shall have failed or refused to remove, in reasonable time, the fixtures complained of." It is not necessary to allude to the ordinance of the mayor and city council of Baltimore, for the reason that whatever authority the appellant possesses in reference to the planting and maintenance of the pole in question, must be derived from and depend on the act of assembly.

The ordinance could not enlarge that authority. To what extent, then, does the statute justify the action of the appellant, and protect it from liability? The planting of a telegraph or telephone pole in a highway or street is not a public nuisance, because the Legislature has declared that it shall not be; but the General Assembly was powerless to subject the reversionary interest in the bed of such highway or street to an additional servitude, without making appropriate provision for just compensation to the owner. *Phipps, etc., v. The Western Maryland Railroad Co.*, 66 Md. 319; *American Telephone and Telegraph Co. v. Pearce et al.*, 71 Md. 535. In the case last referred to, this court held that planting telephone poles upon the right of way acquired by a railroad company was, when the telephones were used for purposes other than the operation of the road, an additional servitude imposed upon the soil, which entitled the owner of the reversion to an injunction against the telephone company to restrain it from so appropriating the land until compensation, to be ascertained in the method prescribed in sec. 40, art. 3, of the Constitution of the State, should be first paid or tendered. And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee. *Thomas v. Ford*, 63 Md. 346. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful, unless the right to do so is acquired by contract or condemnation. *Western Union Telegraph Co. v. Williams*, 86 Va. 696; *Broome v. New York and New Jersey Telephone Co.*, 42 N. J. Eq. 141. The use to which *streets* in a town or city may be lawfully put are greater and more numerous than in the case of an ordinary road or highway in the country. With reference to the latter, as we have just observed, all the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and by virtue of this ownership is entitled, except for the purposes of repair, to the earth,

timber and grass growing thereon, and to all minerals, quarries and springs below the surface. But with respect to *streets* in populous places the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam and other things capable of that mode of distribution. 2 Dillon Mun. Cor., secs. 656a and 688. Subject to these and other like rights of the municipality and the public to the use of a street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation, for additional servitudes placed thereon, that the owner of the bed of a highway in the country is entitled to. If, then, the fee in the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land, for which she could claim compensation, and the act of assembly could not deprive her of it. But in many instances the beds of the streets are owned in fee by the city, and in others the fee is vested in the original owners of the land or their heirs, and does not belong to the owners of the lots abutting on the streets. If the fee be in the city, or in some third person, then, first, what are the rights, in a case like this, of the owner of a lot abutting on the street? and, secondly, how are those rights affected by the provisions of the Code relied on in the pleas? There is some diversity of opinion in the decided cases upon the first of these questions, but all agree in going at least this far — and we are not required to go any farther in deciding this appeal — that where the fee or legal title has passed from the original proprietor, as in cases where the land has been acquired for streets by the exercise of the right of eminent domain, the adjoining owner cannot maintain an action for injuries to the soil, or ejectment, but he never-

theless has a remedy for any special injury to his rights by the unauthorized acts of others. Hence, if an appropriation of a street by a person or body corporate, even under legislative and municipal sanction, unreasonably abridges the right of adjacent lot owners to use the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation; and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use for the recovery of such immediate and direct damages as the abutter may sustain. *Elizabeth, Lexington and Big Sandy Railroad Co. v. Combs*, 10 Bush. (Ky.) 382; *Schurmeier v. St. Paul and Pacific Railroad Co.*, 10 Minn. 82; affirmed in 7 Wall. 272; *Cooley* Con. Lim. 556. Indeed, this is merely the application of familiar principles of the common law.

Whether, then, the appellee be the owner of the reversion in the bed of the street, or only entitled to the rights of an abutter on the street, the pleas demurred to set forth no facts which furnish a defense to the action; because, as against the owner of the fee, the provisions of the Code relied on in the pleas are inoperative for the reasons we have given; and, as respects the owner of a lot abutting on the street, they expressly reserve, and they could not have validly denied, his right to recover for such direct and immediate injuries as he might sustain by the construction of a line of telegraph and telephones upon a public street or thoroughfare. Whether the damages to be recovered shall be upon the basis of the permanent occupation of the premises, or only for the period up to the bringing of the suit, is left to the election of the company; and it would necessarily follow, if the recovery should be limited at its instance to the latter period, that subsequent suits could be brought, and in an appropriate case an injunction could be procured to prevent a continuance of the interference. It results, then, that neither the rights of the owner of the reversion nor those of the abutter upon a street are reabridged by the statute, and that, in so far as that statute attempts or was intended to effect that result,

it is nugatory and inoperative. As a consequence, whatever rights the appellant did acquire under the statute are subordinate to the property rights of the appellee, and the pleas which rely upon the statute and the ordinance, as giving the appellant authority to plant and maintain its posts and wires without regard to the injury caused the appellee, were very properly declared to be no answer to the action.

The remaining questions involved are presented by the exceptions taken to the admission of evidence, and to the rulings of the court on the prayers for instructions to the jury. There are twelve of these exceptions. Eleven of them relate to the admissibility of evidence adduced by the appellee upon the question of damages, and the twelfth to the granting of the appellee's second prayer, and the rejection of appellant's first.

It is not necessary to discuss separately the exceptions which relate to the measure of damages, for they all present the same question, substantially. The appellee proved by several witnesses the amount which, if they owned the property, they would, in their opinion, give not to have the pole placed where it is, and the amount which they would give to have it taken away. She further proved by another witness that, with the pole removed, *he* would be willing to pay more rent for the property than he would with the pole standing where it is; and by still another, that *for the purposes of his business* he would make a difference of \$500 in the rental value of the premises. None of this testimony was admissible. The true measure of damages in such a case as this is not what a particular individual would be willing to charge for having the pole put up or remain, nor the amount some other person might consider the rental value was depreciated for the purposes of his business; but where the *land* of the plaintiff is not taken, or his soil actually invaded, the measure of damages, as adjudged in many cases, is either, first, the extent to which the rental or usable value of the particular property has been diminished by the trespass or injury complained

of. *Baltimore & Ohio Railroad Co. v. Boyd et al.*, 67 Md. 41; *Wood, &c. v. Slate, use of White*, 66 Md. 61; or secondly, the difference in the value of the property before the construction of the pole, and its value afterwards, if the depreciation in value has been caused by the erection and maintenance of the pole. *Shepherd v. Baltimore & Ohio Railroad Co.*, 130 U. S. 426.

* * * * *

For the error in admitting the evidence objected to in the first eleven exceptions the judgment must be reversed, and a new trial must be awarded.

Judgment reversed and new trial awarded.

NOTE.—See note to *Detroit City Ry. Co. v. Mills*, post.

**WILLARD JOHNSON, Respondent, v. THE THOMSON-
HOUSTON ELECTRIC COMPANY, Appellant.**

N. Y. Supreme Court, General Term, Fourth Dept., Nov., 1889.

(54 Hun, 469.)

ELECTRIC LIGHT FIXTURES IN STREETS.—RIGHTS OF ABUTTING OWNERS.

The erection and maintenance of electric light poles for street lighting is within the licensing power of a municipal corporation endowed by the Legislature with the control of its streets. It is a street use, for which the abutting owner is not entitled to additional compensation.

Granted the necessity of a pole in a given vicinity, and one owner cannot complain that it was erected over against his land rather than that of some neighboring owner.

Cases of this series cited in opinion: *Tuttle v. Brush, &c. Co.*, vol. 1, p. 506; *Met. Teleph. & Tel. Co. v. Colwell Lead Co.*, vol. 1, p. 662.

APPEAL from judgment entered in Oswego county, requiring the defendant, an electric lighting company, to remove a pole in a street in the village of Fulton.

Facts stated in opinion.

Giles S. Piper, for the appellant.

Mead & Stranahan, for the respondent.

MARTIN, J. : We are of the opinion that the plaintiff was not entitled to the relief awarded by the judgment herein. The defendant erected a pole in one of the streets of the village of Fulton, in front of the plaintiff's premises, without his consent. The board of trustees of the village granted to the defendant a license to erect poles and wires in the streets and grounds of the village. The act incorporating the village conferred upon such board jurisdiction and control over the streets therein. The Special Term found that the board had power to maintain lights in the streets of the village, and to procure and erect necessary fixtures for lighting such streets. The pole in question was erected for the purpose of supplying electricity for electric lights to light the streets of the village, and also for private use. It was also intended that a street light should be suspended therefrom. The learned trial judge held that the license of the board of trustees did not justify its erection or maintenance, and directed its removal.

It must be admitted that the streets of a populous village or city are subject to greater burdens and to a greater variety of uses than a rural highway, and that the extent of an easement in a street is to be measured by the necessities of the public. In *Lahr v. Metropolitan Elevated Railway Company*, 104 N. Y. 292, RUGER, Ch. J., said : "Statutes relating to public streets, which attempt to authorize their use for additional street uses, are obviously within the power of the Legislature to enact. * * * Such are the cases in respect to changes of grade, the use of a street for a surface horse railroad, the laying of sewers, gas and water pipes beneath the soil, the erection of street lamps and hitching posts, *and of poles for electric lights used for street lighting*. All of these relate to street uses

sanctioned as such by their obvious purpose, and long continued usage, and authorized by the appropriation of land for a public street." In *Tuttle v. Brush, etc., Company*, 50 Super. (18 J. & S.) 464, it was held that city authorities had full power over the matter of lighting streets, and might authorize the erection of poles to be used for that purpose. See, also, *Harlem Gas Company v. Mayor, etc., of New York*, 33 N. Y. 327, and other cases cited in opinion in *Tuttle case*.

In *Metropolitan Telephone and Telegraph Company v. The Colwell Lead Company*, 50 N. Y. Super. (J. & S.) 488, it was held that the streets could not be used for the erection of poles to conduct telegraph and telephone wires, and in the *Tuttle* case the right to use the street for the purpose of supplying electricity to private persons was doubted. We think it quite clear that the trustees of the village of Fulton had power, under and by virtue of the provisions of the charter, to authorize the defendant to erect the pole in question for the purpose of lighting the streets of the village. That the board could properly authorize its erection, for the purpose of supplying light for private use, may well be doubted, as it could not devote the street to purposes other than those for which it was intended without compensation to the owner. *Mahady v. The Bushwick R. R. Co.*, 91 N. Y. 148. We think it must be held that, under the license given by the trustees, the defendant had the right to erect this pole, and use it for the purpose of supplying electricity necessary to light the streets in that vicinity, and to use it as a point from which to suspend a street light. One, and perhaps the chief, purpose of locating the pole at this place was to furnish a proper light for the streets in that locality. So far as its erection was for that purpose, it was lawful, and did not invade the plaintiff's just rights. The fact that the defendant might have intended to use it for other and unjustifiable purposes may have entitled the plaintiff to an injunction restraining such unauthorized use, but did not, we think, entitle him to have it wholly removed, so long as

it was reasonably necessary and proper for the public service.

It is true that the court found "that this pole * * * was not necessary for the public use alone, and there were other places where it might have been located so as to answer the same purpose." Whether the trial judge intended by this finding to decide that no pole was necessary at that place for public use, or whether his intention was to find that it was not alone necessary for that purpose, but was also necessary for private use, is not quite clear. If the former, it is, we think, adverse to the concession of the parties, and against the weight of the evidence. On the trial it was conceded that this pole "was convenient and reasonably necessary to the furnishing light for public and private use." This concession involved the necessity of this pole to furnish light for public as well as for private use, and the evidence tended to show quite conclusively that such a pole in that vicinity was necessary for the proper maintenance of a street light which was required at that place. We do not think it an answer to the right claimed to say that this pole might have been placed on the land of others. If it was necessary that it should be located in that vicinity, the burden could as properly be imposed upon the street in front of the plaintiff's premises as upon the street in front of the premises of his neighbor.

Upon the evidence, admissions and facts, as presented on this appeal, we are of the opinion that the judgment directing the removal of the pole in question was not justified; that the court erred in directing such judgment, and for that error the judgment should be reversed.

The judgment should be reversed, with costs to abide the event.

HARDIN, P. J., concurred; MERWIN, J., not sitting.

Judgment reversed on the exception and a new trial ordered, with costs to abide the event.

NOTE.—See note to *Detroit City Ry. Co. v. Mills*, *post*.

THE ELECTRIC CONSTRUCTION COMPANY, Respondent, v.
JEREMIAH HEFFERNAN ET AL., Appellants.

New York Supreme Court, General Term, Third Dept., Nov. 28, 1890.

(34 N. Y. St. R. 436; Mem. 58 Hun, 605.)

POLES IN STREETS.—ABUTTING OWNERS.—ELECTRIC LIGHTING.—NUISANCE.
—INJUNCTION.

Held, that an injunction *pendente lite* was properly granted at suit of an electric light company to restrain the pastor and congregation of a church from cutting down a pole in front of the church, there being evidence that the company had municipal authority to erect poles.

Defendants had no right to remove the pole as a nuisance, unless it interfered with their right of passing along the highway, of which there was no evidence.

Case of this series cited in opinion: *Johnson v. Thompson-Houston Electric Co.*, vol. 8, p. 208.

APPEAL from order of Special Term, granting temporary injunction.

Facts stated in opinion.

Edwin Countryman, for appellants.

E. T. Brackett, for respondent.

LEARNED, P. J.: The plaintiff is a corporation engaged in the business of electric lighting, and has a contract with the village of Schuylerville to furnish its streets with electric lights. The village of Victory lies immediately south of Schuylerville, and the center of Burgoyne street, running east and west, is the dividing line.

The plaintiff put up poles for lighting on the north side of Burgoyne street, from the east end till it reached Gates avenue. Then it erected poles on the south side to hold wires.

Two poles fifty feet high were placed in front of the Church of the Visitation, which stands on the southwest corner of Gates avenue and Burgoyne street, fronting on Burgoyne and in the village of Victory.

These poles were cut down a few days afterwards, and when plaintiffs attempted to dig holes to put up new poles the defendants interfered and riotously prevented the erection of the poles, and threatened to cut down any which should be erected.

The plaintiff brought this action to restrain, by final judgment, any such interference with its poles; and the plaintiff obtained, on motion, an injunction pending the action to the same effect, from which the defendants appealed.

Said injunction was granted on the complaint and affidavits presented on each side. Several points are raised on this appeal. It is insisted by the plaintiff that the Church of the Visitation is not the owner of the fee of any part of Burgoyne street; while defendants insist that it is.

So far as this action is concerned, we think the matter is not very material. *Lahr v. The Metropolitan Railway Company*, 104 N. Y. 268; 4 N. Y. State Rep. 340. If it should become important to decide the question, we should be of the opinion that the description of the land in the deed to the church did not convey any part of the street.

The starting point is in the west bounds of Gates avenue, 150 feet southerly from the south bounds of Burgoyne street; the last course is from Burgoyne street 150 feet along said avenue to the place of beginning.

The *Lahr* case above cited recognizes the right of the Legislature to authorize the use of public streets for many purposes besides that of mere travel. Among these are the laying of sewers, gas pipes, water pipes and the erection of poles for electric light used for street lighting. The same is recognized in *Johnson v. Thompson-Houston Electric Co.*, 54 Hun, 469; 28 N. Y. State Rep. 295. In the last case a doubt is expressed whether the municipal authorities could authorize the erection of poles for supplying light for private use. The reason given is that such use would

entitle the owner to compensation. *Mahady v. Bushwick Railroad Co.*, 91 N. Y. 148. Now it must be noticed that, although the owner may be entitled to compensation in such a case, yet it does not follow that he has any other right.

And we should think that municipal authorities might authorize the laying of water pipes in streets, even though the principal, perhaps the sole use, should be to supply the private needs of citizens.

Therefore, we are not ready to say that proper structures intended to supply electric light to all private houses which might need it would be an unlawful use of the public street. In the present case two positions are urged by the defendant: one is, that no authority was actually granted by the trustees of Victory; the other, that if such authority was granted it was only to facilitate the plaintiff in its business of lighting Schuylerville, and had no reference to the public or private lighting of Victory.

The affidavit of the president of the board of trustees of Victory and also of one of the board, and the affidavit of the president of plaintiff, state that about May 14, 1890, at a meeting of the board, resolutions were passed authorizing plaintiff to erect poles for the purpose of lighting the village; that this was done pursuant to a vote of the taxable inhabitants authorizing the trustees to provide for such lighting.

In opposition, the clerk of the village makes an affidavit that the book of minutes shows no meeting on that day and that no such resolutions were passed. He further states that a taxpayer's meeting was held May 13th, with a full board of trustees present, at which a resolution was passed to the effect that the trustees be empowered to make all contracts for lighting the village with electric lights.

He further states that on the 23rd of June, 1890, a resolution of the board was passed affirming that on the 14th day of May they met the president of plaintiff as a board and gave him leave to erect poles for lighting the village with electricity. It does not appear that the village

has made any contract with the plaintiff for lighting its streets. It is very possible that the plaintiff, for some reason, in its business of lighting Schuylerville, desired to erect poles for a distance on the south side of Burgoyne street. But that desire is not inconsistent with a plan of furnishing light to Victory, both to its streets and its private houses.

The villages are close together, and the same plant may serve for both. We ought not, especially in this preliminary matter, to assume that the poles which the plaintiff has erected are not to be used for the benefit of Victory.

It is averred in the complaint that these poles are a part of the pole line necessary to string the wires to furnish light for Victory. If this is so, the fact that they are also connected with the Schuylerville line does not make them objectionable.

On the question whether authority was given by the trustees, it appears that the municipal authorities consist of a president and three trustees. Two of these state that the authority was given at a meeting of the board on due notice. None of them deny it. No action is taken by the village questioning the authority thus given. We think, therefore, that the Special Term was justified in holding upon this motion that authority had been given.

There is still another consideration. The defendant must have cut down these poles on the claim that they were a nuisance, obstructing the highway. In *Harrower v. Ritson*, 37 Barb. 301, there is a very elaborate discussion as to the rights of a private individual in respect to obstructions in the highway.

And the conclusion is that if there be such a nuisance a private individual can interfere with it only so far as is necessary to exercise his right of passing along the highway. "He may remove that which interferes with his rights to the extent necessary to the reasonable enjoyment of the right of which the thing interposed would deprive him, doing no unnecessary damage. A party by erecting a nuisance does not put himself or his property beyond the

protection of the law." There is nothing in this case showing that the poles interfere with defendants' use of the highway. Under the case last cited, therefore, the defendants could not lawfully cut down these poles, even if it be assumed that they are a nuisance and could be abated by action. We do not wish to decide on the merits of this case as it may appear upon the trial. The only question is whether, on the facts before the Special Term, the injunction was properly granted. It may appear on the trial that special damage is occasioned by these poles, for which the church should be compensated. But we think that the defendants should not be allowed to destroy the plaintiff's property as they have done.

Order affirmed, with ten dollars costs and printing disbursements.

LONDON and MAYHAM, JJ., concur.

NOTE.—This case is cited in the one next following, as authority for the proposition that the Legislature may authorize the use of streets for electric lighting.

See note to *Detroit City Ry. Co. v. Mills*, *post*.

THE CONSUMERS GAS AND ELECTRIC LIGHT COMPANY,
Appellant, v. THE CONGRESS SPRING COMPANY AND
OTHERS, Respondents.

New York Supreme Court, Third Dept., July, 1891.

(61 Hun, 133.)

POLES AND WIRES IN STREETS.—ABUTTING OWNER.—INJUNCTION.—
MUNICIPAL CONTROL.

The exercise of an authority delegated to a municipality by sovereign power is a legislative act, and cannot be impeached collaterally. The use of streets for electric lighting appliances imposes no new burden upon the abutting owner.

Gas and Electric Light Co. v. Spring Co.

Therefore, in an action brought to restrain an abutting owner from cutting down electric light poles erected with municipal consent given pursuant to the authority of the Legislature of the State, the validity of the ordinance granting the franchise to erect poles cannot be questioned.

Case of this series cited in opinion : *Electric Construction Co. v. Heffernan*, vol. 8, p. 207.

ACTION by an electric lighting company for an injunction restraining a property owner from cutting down a pole to be erected by the plaintiff in place of one which had previously, with the defendant's consent, been erected in front of his property, but which he had cut down and threatened to cut down any other which might be erected there, and for damages.

The complaint alleged, among other things, permission from the board of trustees of the village, clothed with the authority of commissioners of highways, to the plaintiff to set its poles and string its wires in the streets.

The answer contained the following allegation, set up as a separate defense :

"It is alleged upon information and belief that any consent, grant, right or franchise by the board of trustees of said village to plaintiff to set poles or string wires in and along the streets or alleys of said village, if any was granted or conferred as alleged, was unauthorized and illegal and was obtained from said board of trustees, and the individuals or some of them, composing said board of trustees, through fraud and by means of fraudulent and illegal inducements and wrongfully ; and the same was not a legal or valid consent, grant, right or franchise, and did not authorize any poles or wires to be placed in said streets or alleys, and any person assuming to act in relation to the premises thereunder, by placing poles or wires in or through Putnam street, wrongfully entered upon and trespassed upon defendant's said property and was a wrong-doer, violating defendant's rights in its property aforesaid."

The plaintiff demurred to this part of the answer, upon the ground that it was insufficient in law upon the face thereof.

The judgment and order appealed from overruled the demurrer.

W. P. Butler, for the appellant.

D. E. Wing, for the respondents.

LONDON, J.: We think the demurrer well taken. The answer does not deny that the board of trustees of the village granted plaintiff consent to erect its poles and string its wires, or allege any fact tending to invalidate such grant of consent, except the allegation that the same was obtained "through fraud and by means of fraudulent and illegal inducements, and wrongfully." Passing the question whether this is a sufficient allegation of fact, public policy forbids that the acts of municipal bodies, in passing ordinances or administrative regulations, should be impeached collaterally. *Porter v. Purdy*, 29 N. Y. 106.

The ordinance of the board of trustees is a Legislative act. *Duryee v. Mayor*, 96 N. Y. 477; *Mayor v. Third Avenue R. R. Co.*, 16 N. Y. St. Rep. 122. The authority to pass it exists in pursuance of the delegation by the Legislature to the board of trustees of the village of such local legislative powers as may be suitable to their proper organization, for which the Legislature is required to provide (Const. art. 8, sec. 9), and is, therefore, an exercise of the sovereign power of the State. Whatever powers may exist in the judiciary to vacate such action for fraud and corruption in its exercise, it would, as said by Chief Justice MARSHALL, in *Fletcher v. Peck*, (6 Cranch, 87), "be indecent in the extreme, upon a private action between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State." See *Baird v. Mayor*, 96 N. Y. 567, 581. The validity of the grant of the privilege cannot thus be assailed, and this part of the answer is invalid as a defense. Every other part of the answer demurred to is so dependent upon this part that it falls with it.

The defendants contend that because the license given by the trustees operates to permit the plaintiff to invade their lands, and thus prejudice their property rights, the defendants should be permitted to allege anything which avoids the license. The contention is based upon a false assumption. The license in question comes from the sovereign power. Sovereign power is limited by constitutional restraints, and the defendants' protection against the invasion by the sovereign of private rights exists only in such restraints. Private property shall not be taken for public use without compensation. But the property in question has been taken for public use, and, presumably, compensation was long since made or waived. The Legislature may authorize the use of the streets for other purposes than travel, and electric lighting is one of such purposes. *Electric Construction Co. v. Heffernan*, 34 N. Y. St. Rep. 436. It thus enlarges the usefulness of the public right; it does not invade any right preserved by the defendant. When the street was first acquired for public use this particular right was acquired, though long unexercised. The license given by the trustees is thus within the public right, and this is merely the first time that it has thus been exercised. Of course, if the exercise of this right, owing to peculiar and special circumstances, should injuriously affect the lot of the defendants, and thus injure property which the public have no right to invade, or should be solely for private purposes, defendants might have a right to protection or compensation, which the present pleadings do not present.

The judgment and order should be reversed, with costs, and the demurrer sustained with costs.

LEARNED, P. J., and MAYHAM, J., concurred.

Judgment reversed and plaintiff's demurrer allowed and judgment for plaintiff for costs below and of appeal.

NOTE.—See note to *Detroit City Ry. Co. v. Mills*, post.

F. W. PELTON AND OTHERS V. THE EAST CLEVELAND
RAILROAD COMPANY.

Cuyahoga County (O.), Common Pleas, July 29, 1889.

(23 Weekly Law Bulletin, 67.)

ELECTRIC STREET RAILWAY.—RIGHTS OF ABUTTING OWNER.

When street car tracks are so located, and the structure in the highway is of such a character, as not to substantially invade private rights; that is, the right of convenient ingress and egress and such other incidental uses of the street as may be necessary to the convenient use and enjoyment of abutting private property, then the owner must be taken to have contemplated such modes of use and has no claim for compensation. If, on the other hand, the construction is of such a character and is so located as to substantially invade private rights, then the individual is entitled to compensation.

Under this rule, the use of electric motors, with poles and overhead wires, imposes no new burden for which abutting owners must be compensated. Case of this series cited in opinion: *Mt. Adams, &c. Co. v. Winslow*, vol. 2, p. 262.

THE facts are stated in the opinion.

Burke & Ingersolls, for plaintiffs.

J. M. Jones, R. P. Ranney, Richard Bacon, for defendant.

STONE, J.: The plaintiffs (about one hundred and twenty-five in number) seek in this proceeding to enjoin the East Cleveland Street Railroad Company from applying and operating the electric system of motive power in the running of its street cars, now in use in its road east of Willson avenue to the easterly limits of the city of Cleveland, on its line and tracks *west* of Willson avenue, extending along Euclid avenue to Case avenue, thence

along Case avenue to Prospect street, thence along Prospect street to the public square.

This railroad company was incorporated in 1859, and constructed its road under the provisions of a general ordinance of the city of Cleveland, regulating the construction and operation of street passenger cars drawn by horses or mules, passed September 20, 1859. It had the consent of the city council, and the requisite number of property owners owning property abutting on the street named, to construct a single track road, with all the necessary turn-outs and switches, and it was so constructed and operated until 1873, when the city council authorized the company to lay a second or double track along the streets named, and the majority of abutting property owners gave written assent thereto.

In 1879, its charter being about to expire, the railway company applied to and obtained from the city council by ordinance, a renewal of its charter or grant, to maintain and operate its railroad in all the streets named, for the further period of twenty-five years. The assent of the abutting property owners to this renewal of the grant was not asked for or given. On the 13th of July, 1888, the city council passed an ordinance granting to the East Cleveland Railroad Company, then operating its cars by horse power, the right to erect and maintain poles and wires and all necessary appliances for producing and conducting currents of electricity as the motive power in operating its cars on that part of its line on Euclid avenue east of Willson avenue to the city limits, and on its Cedar avenue branch east of the Cleveland & Pittsburgh R. R. crossing.

Section 8 of this last named ordinance provides that "whenever the council shall so require, the said company shall use the same system as herein provided, on the entire length of its Main and Cedar avenue lines." This ordinance was accepted by the railroad company, and in pursuance thereof it erected its electrical plant, and ever since has operated its cars by electricity over the parts of its road so authorized.

On the 13th of May, 1889, the city council, by resolution, authorized the railroad company to extend the use of its electrical system westerly, over that portion of its road now in controversy. This resolution was accepted by the company, and it proceeded with the placing of wires along its track, until interrupted by the restraining order in this case.

The assent of the property owners along the road west of Willson avenue, to the proposed change from animal power in moving cars to that of electricity, applied by the overhead wire system, was never asked or given. It is now contended by the plaintiffs, who are owners of property abutting on Prospect street, Case and Euclid avenues between Willson avenue and Erie street, that this company is proceeding illegally and without lawful authority, and,

I. It is said there was no lawful renewal, in 1879, of the grant to operate this railroad for the further period of twenty-five years; that the renewal of the grant is essentially a new contract to be fixed by ordinance, which the city council could no more enter into or grant without the consent of the abutting lot owners, than it could grant the right to construct the railroad in the first instance without their consent.

Section 2501 of the Revised Statutes provides, in substance, that

No corporation, individual or individuals, shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and council by ordinance shall have granted permission and prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated. * * * And cities of the first and second grade of the first class may renew any such grant at its expiration, upon such conditions as may be considered conducive to public interests.

The next section (2502) provides in part that

No ordinance for such purpose shall be passed, * * * and no such grant shall be made, except to the corporation, individual or individuals that will agree to carry passengers upon such proposed railroad at the

lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders on the line of the proposed street railroad, represented by the foot front of lots abutting on the street along which such road is proposed to be constructed, etc.

It seems clear that the ordinance provided for in the section first quoted (2501) has reference only to the *original construction* of the railroad ; that it means simply this : Before any street railroad shall be constructed, city council shall, by ordinance, grant permission and prescribe the terms and conditions of such construction and operation, but that the council may *renew* such grant at its expiration, upon such terms as shall be conducive to public interest. Then the next section (2502) says that no ordinance or grant for such purpose shall be passed or made without first obtaining the consent of a majority of the abutting property owners, represented by the feet front upon the street along which the road is proposed to be constructed.

This consent very clearly has only to do with, and is required only in cases of original occupancy of a street for a street railroad and original construction, and not to the renewal of a grant.

In the case of the *State of Ohio, on relation of the prosecuting attorney against The East Cleveland Railroad Company*, recently decided by the Circuit Court of this county, that court, in considering the rights of this railroad company in respect to its Garden street branch, gave construction to these sections of the statute in these words, UPSON, J. : "It seems to us that the natural construction of the language restricts the operation of those provisions of section 2502 to which I have referred, to the ordinance, which is the only ordinance mentioned in section 2501, providing for the original construction of a street railway. It was not intended by the Legislature that upon a renewal of such a grant either a publication of notice or the consent of the property holders upon the line of the road should be requisite, the law providing that the council in cities of the first and second grades of the first class, may renew such grant upon such conditions as may be considered conducive

to the public interest, leaving the matter as we understand it in that respect, entirely to the judgment of the city council as to what conditions will and what will not be conducive to the [public interest. We hold, then, that the ordinance to which I have referred, which renews this grant of the franchise to maintain a street railway on Garden street between Brownell street on the west and Willson avenue on the east, is not invalid for the reason that notice was not given, and the assent of property holders was not obtained previous to its passage."

This decision seems clearly in point and decisive of this question. We hold therefore that the consent of abutting lot owners was not required, and not a condition precedent to the right of the council to grant a renewal of the franchise of this company in 1879.

II. Again it is urged by plaintiffs that the putting up of the poles and wires, and use of a current of electricity and the running of cars at an increased rate of speed, constitutes *a new and additional burden* upon the street, a new burden upon their property not contemplated by the original contract and grant, and cannot lawfully be done without compensation being first made. This involves the general question as to what is an additional burden upon the street not originally contemplated, for which the abutting owner may have compensation.

It has been determined in numerous decisions, and without dissent except perhaps in New York, that the use of a street by a horse railroad constructed and operated in the ordinary manner, falls within the purposes for which streets are established and maintained; and consequently that for any damages resulting from such use to the abutting owner, he can recover no compensation whether the fee of the street is in him or in the public.

Lewis on Eminent Domain, section 124, and cases cited.

Judge DILLON says: "The appropriation of a street for a horse railway constructed and used in the ordinary mode is such a use as falls within the purpose for which the streets are dedicated or acquired under the power of emi-

nent domain. When authorized or regulated by the public authorities, this is a public use within the fair scope of the intention of the proprietor when he dedicates the street or is paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use." 2nd Dillon's Mun. Corp., sec. 722.

Judge RAMSEY, in the case of the *Cincinnati and Spring Grove Avenue Railroad Company* against *The Village of Cumminsville* (14 O. S. 523), says: "The use of such highway for the purpose of carrying passengers over the same, in this particular manner differs in nothing from the exercise of the common right of carrying them by coaches or omnibuses; and everything needing a grant, or the further authority of law, is the right to place and maintain in the highway the necessary conveniences for this new description of carriages. When this grant is confined to a mere occupation of the easement previously acquired by the public, although its enjoyment may require a restriction upon former modes, we can see nothing in it but the control, regulation and adjustment of a public right, so as to make it best answer the purpose and meet the wants of all classes of the community. It does not exclude or seriously interfere with the original modes in which the highway was used, but simply adds another in furtherance of the general object."

Elsewhere in the same opinion he says: "In either of the modes known to our laws by which lands are acquired for a public highway, an interest commensurate with the attainment of the objects of the acquisition vests in the public at large, and is necessarily placed under the exclusive control of the law-making power. Whatever is fairly within the contemplation of a grant, whether voluntary or forced and necessary to its beneficial enjoyment, is within the legal operation of the instrument or proceedings by which it is effected."

Again he adds: "We see nothing in the street railroad act which induces the belief that the Legislature intended

to authorize either companies or public authorities to grant to railway companies anything more than an interest in the public easement; nor do we see any reason to doubt that such a location may ordinarily be made as to bring the necessary structures for the use of these companies within that interest, and without any invasion of private rights; * * * but where these new structures and new modes of travel devolve additional burdens upon the land, and materially impair the incidental rights of the owner in the highway, they require more than the public has or can grant, and the deficiency can only be supplied by appropriating the private right upon the terms of the Constitution." It is to be borne in mind that in the Cummins-ville case just quoted from, the learned judge was dealing with a case where the street railway track was located on one side of the street, close to the sidewalk or curbstone, and it was found as a fact by the court "that the railway track, laid upon the side of the street as proposed, will be an obstruction to the convenient access to the houses and other improvements on the northwestern side of said highway," etc., and hence the court said that the "justice of the Constitution" required compensation to be made in such a case before the private right could be thus invaded. We have given the general rule and whatever modification prevails in Ohio. The rule for our guidance, then, would seem to be this: When the street car tracks are so located and the structure in the highway is of such a character as not to substantially invade private rights; that is, the right of convenient ingress and egress, and such other incidental uses of the street as may be necessary to the convenient use and enjoyment of abutting private property, then the owner must be taken to have contemplated such modes of use and has no claim for compensation. If, on the other hand, the construction is of such a character and is so located as to substantially invade private rights, then the individual is entitled to compensation.

We think we may safely assert that this structure of the defendant in the streets named, as now used and as it has

been used for the past sixteen years, since the laying of the double track, has not been and does not now constitute an invasion of the rights of these plaintiffs; indeed, we hazard nothing in asserting that this railroad has been of substantial advantage to these plaintiffs and the public generally as a convenient mode of travel.

Now it is proposed to dispense with horse power in the moving of the cars and apply instead the electric motor, operated by a current of electricity from overhead wires, suspended from poles located on either side of the street. The great weight of opinion thus far expressed by the courts is that steam railroads impose a new servitude upon a street which will entitle abutting lot owners to compensation; horse railroads as a general thing do not. Now we have to deal with a new energy, a new energy as a motive power in propelling street passenger cars. Does it constitute a new servitude—a new burden—an additional burden upon the street? Is it a radical and substantial departure in the manner of occupancy of the highway when this new power is applied in the manner here proposed? Is it a move away from the horse railroad toward the steam railroad in its physical relations to the street and its effect upon abutting property and public travel, so that it may be said to be a use of the highway not contemplated in the original grant of the highway?

The Superior Court of Cincinnati, in the case of *Clement* against *The City of Cincinnati*, (16 Bulletin, 355), held that a "street railroad does not cease to be such because a grip cable is substituted for horses as the motive power." In that case a horse railroad was in operation on Gilbert avenue in Cincinnati, and council by ordinance granted the owners the privilege of laying a cable road to be operated by steam power. The court among other things say: "The progress of invention among a people famous for fertility in that regard, especially with respect to rapid transportation, the growth and change of location of population and the teachings of experience, are apt to make such modification necessary to accomplish what was intended in the

creation of agencies of this kind. It is the nature of the use, not the motive power, which determines whether the road belongs to one class or the other. When a road is laid in a street, on the surface of the street, because it is a street, and to facilitate the use of the street by the public, *it is a street railroad* whatever the means used to propel cars over it."

The Circuit Court of Hamilton county, in 1888, in the case of the *Mount Adams & Eden Park Inclined Railway v. Howard Winslow and Others*, had occasion to consider the right to operate an electric system of motive power on the lines of street railroads owned by that company. In that case the court found the facts to be that as an essential part of the system, poles eleven inches in diameter at the bottom, and twenty-seven feet in height, were placed about 100 feet apart on each side of the street and opposite to each other, close to the curbstone; a single wire is stretched on each side of the street from the top of one pole to the top of the other on the same side, and from the top of each of said poles a wire extends to the top of the pole on the opposite side of the street. The object of the wire across the street is to support the two other wires, one of which runs parallel with and immediately above each of the two tracks on which the street cars of the plaintiff, propelled by horse power, have been running for several years past.

It will be seen that the general plan of construction in that case is very like that proposed to be applied here.

"The tracks of the street railroad continue in the condition in which they have been for several years past; the only addition or change which has been made to adapt it to the use of the electric motor being the poles and wires before referred to. If the structure of the plaintiff in the street so long in use is not an invasion of the rights of the defendants (though the same must in the nature of things be some obstruction to the highway, but largely compensated in a populous city by the advantages of this mode of travel), it is difficult to see why the mere placing of a pole of this size on the margin of the sidewalk, at once and

necessarily gives to the owner of the adjacent premises the right to prevent it, or to have it removed. The sidewalk is only a part of the way, and is to be dealt with as such, and it seems to us that a structure erected thereon stands on the same principle as those in the centre of the street. And why should the planting of the pole in this instance be held, on the evidence, to entail any special damages to the defendants? It is not objected that it is unsightly in appearance, or unsuited to the purpose for which it is used; all that is claimed is that it impedes the access to defendants' premises, and that the electric system in use is unsafe. We have found as a fact that neither of these objections is well founded. The margins of the sidewalks in cities for centuries past have been appropriated for the placing of shade trees, public lamp posts, hitching posts and similar structures, and when they are suitably placed, and at sufficient intervals, cannot, we think, be any obstruction to the access to the premises adjacent thereto, or be said to impose new burdens upon the land, the right to impose which has not been acquired by the public. * * * But it (the public highway) was acquired that the public might travel over the same, on foot or horseback or in vehicles of various kinds, and as we have before stated, we think it is the law of this State that the use of cars drawn by horses on rails permanently placed in the roadway is not to be considered of itself an unlawful or improper change of the use of the highway, or as imposing an additional burden upon the adjacent land. And if this be so, then the use of it in substantially the same way, but with a different motive power, would not alter the case. It is still a mode of travel over the same highway."

The Cincinnati case and the one now before the court differ in this, that in that case the action was brought to compel the removal of posts, wires, etc., already in use, while this case is brought to prevent their erection. But the Circuit Court put their decisions upon the broad ground of the right to prevent as well as remove the alleged obstructions or burdens. We have quoted the Cincinnati

case at some length since it throws considerable light upon the questions here involved.

We may now recur to our question. In the case before us, will the proposed change, if made, constitute a new burden or servitude upon the street? It is urged that the operating of cars by electricity is dangerous, and dangerous in that electricity is a dangerous agency to employ. The proof clearly establishes the opposite, that it is safe, suitable and practicable. The tracks are in no manner changed. The cars employed in point of size and appearance are not substantially different. Is more of the traveled and paved roadway occupied by the electric system than when horse power is used? No, but is lessened by the removal of several hundred horses from the street. It is claimed that the speed, twelve miles an hour as proposed, will be a dangerous rate on a street the width of Prospect street. This is a matter within the control of the council with full power to limit the rate of speed to a suitable and safe rate, and one consistent with the uses of a public highway. The court would hardly be warranted in assuming that a dangerous and unlawful or unreasonable rate of speed will be authorized or permitted.

That the cars operated by the electric motor are in perfect and absolute control of the operator is sustained by the proof, as well as by our common observation. That these cars can be stopped quickly, or moved forward or backward at a slow or rapid rate, is apparent.

It is claimed further that these poles or iron posts and wires constitute an obstruction to abutting property; that they are unsightly and a burden upon the street. It is clear that they add nothing to the beauty of a street, but that they amount to a burden or obstruction seems to us more fancied than real. Certainly the proof does not justify such conclusions. One of these poles is no more of an obstruction than a lamp post. If the Cincinnati court found that poles eleven inches in diameter and twenty-seven feet high constituted no obstruction or burden, we
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would be entirely safe in saying that poles only six inches in diameter and twenty-five feet high do not.

It can not be said in seriousness that these poles and wires will obstruct the light or air from the premises of the plaintiffs, or will interfere with ingress or egress to their premises, for it is not pretended or believed that the defendant will so place these poles as to obstruct driveways or other places designed for passageways to and from the street.

It is urged also that the electric motor frightens horses and makes it unsafe to drive along the street in carriages or other vehicles. This was undoubtedly true in the beginning, in the first occupancy of the streets in this city, and it is likely such would be the effect on Prospect street for a brief period of time. But it can not be doubted from the facts submitted, as well as from our common observation, that this difficulty soon disappears, and horses soon become accustomed to the change. In fact, these motor cars are probably no more cause of alarm to horses than were the more primitive horse cars when first introduced into the public highway. Whether a particular structure authorized by public authority is consistent with the use of a street, as a street, must be largely a question of fact, depending upon the nature and character of the structure authorized. The true distinction we think must be found, not in the motive power of the railway, but it depends rather upon the question whether the railway constitutes a thoroughfare, or whether on the other hand it is a mere local convenience consistent with the uses of a street thoroughfare. While the purpose of streets is primarily for public travel, yet in populous districts it has been the immemorial custom to employ them for other purposes of a public nature, which, though having little or no connection with the uses or improvements of the street as a highway, are not inconsistent with such use. Lewis on Eminent Domain, sec. 126.

We are of the opinion that the use here contemplated is a consistent use ; that it is not in the nature of an original

grant imposing new and greater burdens for which these plaintiffs may have compensation, and in so holding we think we are in accord with the judicial thought in this State, and do no violence to the justice or judgment of the Constitution.

Temporary injunction refused.

NOTE.—This case is cited with many others in *Louisville Bagging Co. v. Cent. Pass. Ry. Co.*, *post.*, as illustrative of the position taken by the courts upon the questions involved.

See note to *Detroit City Ry. Co. v. Mills*, *post.*

EDWARD TRACY, Appellant, v. THE TROY & LANSING-
BURGH RAILROAD COMPANY, Respondent.

N. Y. Supreme Court, General Term, Third Dept., December, 1889.

(54 Hun, 550.)

POLES IN STREETS.—ELECTRIC RAILROAD.—INJUNCTION.

An injunction should not be allowed at the suit of an abutting owner, temporarily restraining, during the pendency of an action for permanent injunction, the erection of poles for an electric street railway in a street over against his property, when it does not appear that the injury will be irreparable or so great as the injury to the defendant in the delay of its work, and to the public in obtaining an improved mode of transit.

APPEAL from an order of Special Term vacating an order granting a temporary injunction.

Facts stated in opinion.

C. E. Patterson, for the appellant.

E. L. Fursman, for the respondent.

LEARNED, P. J.: This is an appeal from an order of Mr. Justice EDWARDS, vacating, on a hearing of both sides, an

ex parte order granted by Judge NORR. The order of Judge NORR restrained the defendant from erecting upon Second avenue, in the village of Lansingburgh, opposite the plaintiff's lot described in the complaint, or opposite any other lots of plaintiff in the said village, any poles for the sustaining or forming part of an electric motor system for furnishing power for propelling cars.

The learned justice who vacated the order, without passing upon the important questions which might arise on a trial of the action, placed the reversal of the order, in his opinion, on the ground that this was not a case where an injunction pending the action should be granted. He held that there was no evidence that, if the defendant's work was allowed to proceed until the trial of the action, any irreparable injury would be done, or any injury which could not be compensated by a pecuniary payment; and he further said that if the injunction were allowed to stand, a public improvement, believed to be of utility, would be obstructed for many months, which in the end might be allowed to proceed. And, further, that by this temporary injunction the plaintiff had, without a trial, accomplished the object of his action, and had no longer any inducement to press forward the case.

With these views, for a fuller statement of which we refer to his opinion, we concur. They are in harmony with the decision of this court in *Power v. Village of Athens*, 19 Hun, 167. We therefore affirm the order, without expressing any opinion as to the right of the plaintiff on a trial to have a perpetual injunction, as prayed for.

LANDON and FISH, JJ., concurred.

Order affirmed, with ten dollars costs and printing disbursements.

NOTE. The following is the opinion delivered at Special Term:

EDWARDS, J.: Since 1861, the defendant has owned and operated a horse railroad for the transportation of passengers, extending from the southerly part of the city of Troy through the village of Lansingburgh. It purposes to substitute electricity as a motive power for the propulsion of its cars, and has adopted what is known as the system of overhanging

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wires, which requires the erection of poles on each side of the line of its track. The poles are to be placed immediately inside of the curb line of the sidewalks, to be 120 feet apart, 8 inches square at the surface of the sidewalk, tapering at the top, 20 feet in height from the surface, and to be smoothed and painted. Consent of the local authorities of Troy and Lansingburgh has been obtained to such change of motive power, and the work of substitution is rapidly progressing to completion. There is no proposed alteration in the grade of the streets, nor increase in the number of tracks. The plaintiff is the owner of real estate adjoining a public street in the village of Lansingburgh, known as 'Second avenue,' through which the defendant's road runs. Opposite this land of the plaintiff, and immediately within the curb line of the sidewalk, the defendant intends to erect two poles, in the manner and of the kind described. The plaintiff has brought this action to perpetually enjoin the defendant from the erection of these poles, mainly on the ground that he is the owner of the land to the center of the street in front of his premises, subject to the public easement, and that the contemplated structures thereon, without his authority, or without compensation to him therefor, are an illegal interference with his property which will work irreparable injury to him. At the commencement of the action, on an *ex parte* application, he procured a temporary injunction against the defendant, on which, and on accompanying affidavits, it now moves for a dissolution of the injunction. The legal rights and the equities of the plaintiff are controverted by the defendant. Upon the argument, several important questions growing out of these were discussed by the learned counsel; but, if I am correct in the application of the principles which, in my judgment, must control the disposition of this motion, any expression of opinion by me on such questions in the present condition of the action will be unnecessary. A marked distinction obtains between a final and a temporary injunction, and the principles on which they are granted. The former is the determination made after a trial on the merits, and is a matter of absolute right, depending upon the settled rules of equity; while the latter is discretionary, does not determine any questions of right, and largely depends upon the exigencies of the particular case. It is not necessary to discuss here the principles which should govern a court of equity in granting or withholding a final injunction. We are concerned only with the rules which apply on an application for a preliminary or temporary injunction, and these I deem to be well settled. On such an application the injunction should not be granted except upon a showing of irreparable injury—such injury as does not admit of pecuniary compensation. Indeed the main, if not the sole ground on which a temporary injunction can be sought, is that there is on the part of the defendant an actual or threatened invasion of a clear right, and, unless he is enjoined during the pendency of the action, injurious consequences will result to the plaintiff, for which a compensatory judgment in damages will be inadequate. There is the further rule, on an application for a preliminary injunction, that the courts will have regard to the relative convenience or inconvenience

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that will result to the parties from granting the order. These principles are too familiar to require the citation of any authorities. A concise expression of them by the general term of this department is contained in *Power v. Village of Athens*, 19 Hun, 167, in which the court say: 'We have had occasion to remark more than once that an injunction *pendente lite* should not be granted, unless the court could clearly see it was needed to prevent irreparable injury — that is, injury which could not be compensated in damages; or that the injunction itself could do no serious harm to the party enjoined. The merits of the case should be heard at a regular trial. And, if the plaintiff be there successful, and a permanent injunction is needed to protect him, he should have it. But generally, the merits of the case should not, if possible, be disposed of on an application for an injunction *pendente lite*.' Applying these rules to the facts of this case, I think the defendant should prevail on this motion. There is no evidence before me that the erection of the two poles would work an irreparable injury to the plaintiff during the pendency of the action. There is an allegation to that effect in the complaint, but no specific fact is set forth therein, nor in the accompanying affidavits, from which such injury could be inferred, and the allegation is denied by the defendant. Furthermore, it is highly improbable that such injury would be irreparable, or one for which money damages would not be an adequate compensation. If the threatened act is an invasion of the plaintiff's property rights, it is clearly a trespass, and the defendant, who is conceded to be of undoubted responsibility, can be compelled to respond to the plaintiff in damages. It is unlike the case of a threatened nuisance, which may be offensive to the senses, or detrimental to health, and so attended by consequences for which money cannot compensate. If, upon the trial, the plaintiff shall succeed in establishing his legal rights, as contended for by him, the court can then exercise its preventive power, if it should be deemed a proper case therefor, by its final injunction against the continuance of the erection. The defendant will also be liable to make pecuniary compensation to the plaintiff for any trespass committed. I suspect that in no event can the injury to the plaintiff be serious, nor can he be subjected to any considerable inconvenience during the pendency of the action. On the other hand, if the temporary injunction is not vacated, an improvement in the means of transit believed to be of public utility will be obstructed; the work of erecting the poles and substituting the new motive power, already quite far advanced, will be suspended for many months; and, if the defendant should ultimately succeed on the trial, it would doubtless have sustained damages difficult, at least, if not impracticable, to estimate. Besides, in this case the action is brought for a final judgment restraining the defendant from doing the very act which he is enjoined from doing by this preliminary or temporary injunction. The plaintiff has thus summarily obtained his relief without a trial, and is not concerned with the further prosecution of his action. This but furnishes another reason why courts should proceed with great caution in the exercise of this almost arbitrary power. In such a case, the

plaintiff's legal rights should be plain and clear, and the violation of them undoubted. For these reasons, and without expressing or intimating any opinion on the question of legal rights involved in the action, I am of opinion that the motion to vacate the temporary injunction should be granted."

This case is cited in the next following.

See note to *Detroit City Railway v. Mills*, *post*.

WILLIAMS V. CITY ELECTRIC RAILWAY COMPANY.

U. S. Circuit Court, E. D. Arkansas, March 26, 1890.

(41 Fed. R. 556.)

ELECTRIC RAILWAY.—RIGHTS OF ABUTTING OWNER.

(Head-note by the court):

The difference between railroads for general traffic and street railroads consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared with the speed of traffic railroads; which carries no freight, but only passengers, from one part of thickly populated district to another in a town or city, and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossing to receive and discharge its passengers, is a street railroad, whether the cars are propelled by animal or mechanical power.

Where a city is authorized by its charter to contract for the construction of street railroads, it may authorize such railroads to be operated by animal or mechanical power.

The operation of a street railroad by mechanical power, when authorized by law, on a public street, is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use, only, of the street as a public highway, and affords to the owner of the abutting property, though he may own the fee of the street, no legal ground of complaint.

In equity. On bill for an injunction against the operation of a street railroad with steam motors.

Sam W. Williams, for plaintiff.

John B. Jones and John M. Moore, for defendant.

CALDWELL, J.: A statute of the State of Arkansas providing for the organization and defining the powers of municipal corporations provides that

Sec. 754. They shall have power to provide for lighting the streets and alleys of the city by gas or otherwise, and to authorize the construction of gas works and of street railroads. Sec. 755. For the purpose of providing water, gas, or street railroads, the mayor and council may contract with any person or company to construct and operate the same, and may grant to such person or company, for the time which may be agreed upon, the exclusive privilege of using the streets and alleys of such city for such purpose or purposes. Mansf. Dig.

On the 6th day of December, 1887, the city of Little Rock, acting on the authority of the above quoted sections of its charter, entered into a contract, in due form, with the defendant, by the terms of which the defendant was granted the right to construct, maintain and operate, on certain named streets in the city, "a street railway, with iron or steel rails, to be worked by electric or steam motors, or by cable, or by other power adapted to operating street railways." In pursuance of this contract, the defendant constructed, and is operating by use of steam motors, a street railroad on some of the streets embraced in its contract. The plaintiff owns a lot, with a dwelling-house thereon, on the south-east corner of block 103; and the defendant's road runs around the corner of the block, and its track is in or near the centre of the streets in front and on the side of the plaintiff's lot. The plaintiff alleges that the defendant's engines emit smoke, gas and steam, and produce loud noises, to a degree that renders them a public nuisance; that they render the approach to plaintiff's premises unsafe, and that by reason thereof the plaintiff's property has been damaged in a large sum. The prayer of the bill is "that, unless defendant shall speedily assess and pay damage, and condemn such lot to public use, that it be enjoined from running its trains by steam along said streets, and that said nuisance be abated, and, until defendant shall so condemn and compensate plaintiff, that it be restrained from using said track to run cars over it by any sort of power, or

by means of locomotion." The plaintiff's contention is that the sections of Mansfield's Digest above quoted must be restricted in their operation to street railroads propelled by animal power, and that street railroads propelled by steam or other mechanical power fall within the following provisions of Mansfield's Digest, in the chapter entitled "railroads:":

Sec. 5468. Any right of way heretofore granted by the city council of any city of the first or second class, or the town council of any incorporated town, to any railroad company, through the streets of such city or town, with the right to establish and maintain depots and other improvements and facilities necessary thereto, shall be valid and binding. Sec. 5469. The city council of any city of the first or second class, and the town council of any incorporated town, shall hereafter have power to grant to any railroad company the right of way through the streets of such city or town, with the right to establish and maintain depots, and other necessary improvements, in connection therewith. Sec. 5470. If any property is injured thereby, the railroad company shall be liable for such damage and the same shall be assessed in the manner provided by law for assessing damages for the appropriation for the right of way through lands. Sec. 5471. It shall require the written consent of two-thirds of the property in value of said street or streets; and, to arrive at said value, the last assessment of said real estate on said street or streets shall determine the value of each separate lot or parcel of land thereon. Act March 1, 1883.

The difference between street railroads and railroads for general traffic is well understood. The difference consists in their use, and not in their motive power. The railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly populated district to another, in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers, is a street railroad, whether the cars are propelled by animal or mechanical power. The propelling power of such a road may be animal, steam, electricity, cable, fireless engines, or compressed air; all of

which motors have been, and are now, in use for the purpose of propelling street cars. Encyclop. Britannica (9th ed.), tit. "Tramway." Doubtless, other methods of propelling the cars of street railroads will be discovered and applied. The Legislature having empowered the city to authorize the construction of street railroads, without qualification or restriction as to the motive power to be used on such roads, the city had the undoubted right to authorize animal or mechanical power to be used as motors on such roads. Sections 5468-5471 Mansf. Dig. relate to railroads for general traffic, and not to street railroads, whether propelled by animal or mechanical power. It would be a useless consumption of time to cite authorities to show that it would be competent for the city, under its charter, to authorize the construction and operation, on the streets of the city, of a street railroad propelled by animal power, without providing for compensation to the abutting land owners; but the learned counsel for the plaintiff insists that the rule is different where the propelling power is steam. The distinction attempted to be drawn between animal and mechanical power, as applied to street railroads, is not sound. The motor is not the criterion. It is the use of the street, and the mode of that use. A street railroad propelled by animal power might be so constructed and operated as to be a public nuisance, and render its owner liable to those injured by its improper construction and operation. The same is true of a street railroad operated by mechanical power. It may be so constructed and operated as to be a public nuisance, but the use of steam on such railroads, when authorized by law, does not *per se* make it a nuisance, or entitle the owners of the abutting property to compensation, though the fee of the street is vested in them. It is common knowledge that steam motors, for operating street railroads, are now constructed to emit so little gas, steam or smoke, and make so little noise, that they do not constitute any reasonable ground of complaint to passengers or the public. They can be stopped and started as quickly and safely as horse

cars, and in some respects can be operated with greater accuracy and precision. Such motors are in use in cities and their suburbs in this country and in England. *Encyclopædia Britannica* (9th ed.).

The operation of a street railroad by such steam motors, when authorized by law, on a public street, is not an additional servitude or burden on the land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use, only, of the street, as public way, and affords to the abutting property owner, though he may own the fee of the street, no legal ground of complaint. *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. Rep. 47; *Newell v. Railroad Co.*, 27 N. W. Rep. 839; *People v. Kerr*, 27 N. Y. 204. But a steam motor may be of such construction, or operated in such a way, as to create a public nuisance to the injury of the owners of abutting property; and where that is the case the legislative authority to construct the road will be no justification of the nuisance. If, however, the defendant's road is operated by the use of the improved steam motors generally used on street railroads, and the emission of smoke, gas, and steam, and the noise produced by blast, are no greater than necessarily attend the operation of such motors supplied with the improved appliances and contrivances in common use, then the plaintiff has no ground of complaint at law or in equity. Whether the defendant's road is or is not so operated need not be decided, because, in any event, the plaintiff, on the facts of the case, is not entitled to an injunction, but her remedy, if any she has, is at law. *Osborne v. Railroad Co.*, 35 Fed. Rep. 84; 37 Fed. Rep. 830. The injunction is refused, and the bill dismissed, without prejudice to the plaintiff's right to sue at law.

NOTE.—This case is cited in *Halsey v. Rapid Transit St. Ry. Co.*, *post*, as authority that electric street railways impose no new burden.

See note to *Detroit City Ry. v. Mills*, *post*.

THE LOUISVILLE BAGGING MANUFACTURING COMPANY v.
THE CENTRAL PASSENGER RAILWAY COMPANY.

Louisville Law and Equity Court, Ky., June 30, 1890.

(From private print.)

ELECTRIC RAILWAY.—RIGHTS OF ABUTTING OWNERS.—NUISANCE.—INTERFERENCE OF CURRENTS.—INJUNCTION.

The conversion, by a street railway company, of its horse cars into electric cars, and the construction and maintenance of poles and appliances necessary for the operation of its cars by the overhead trolley system, do not constitute a new servitude upon the street, entitling abutting owners to compensation therefor.

A State statute authorizing the construction and maintenance of such a system in public streets, without consent of or compensation to abutting owners, is therefore not unconstitutional.

The fact that an abutting owner will be prevented by the operation of the electric system of propulsion, from backing wagons across the street to the sidewalk, for the purpose of loading and unloading, as he had done when horse cars were used, does not entitle him to an injunction; for he had no right to thus obstruct the street, the rights of the traveling public on street cars being superior to those of a private citizen; and the fact that he had so monopolized the street in the past is immaterial, since such use or custom cannot ripen into a legal right.

As to the allegation that buzzing would be caused in plaintiff's telephone by the operation of the electric railway, held, first, that the fact did not satisfactorily appear; and second, that if it did it would not authorize an injunction.

So far as the contemplated erection and maintenance of the electric railway appliances may constitute a public nuisance, an individual cannot have it restrained by injunction without showing some injury peculiar to himself.

The single wire overhead trolley system held to be not *per se* dangerous to life or property, and not involving hurt, risk, inconvenience or danger to the property of the plaintiff or to the lives of its officers or employees.

Cases of this series cited in opinion: *Taggart v. Newport Street Railway Co.*, post; *Western Union Tel. Co. v. Rich*, vol. 1, p. 271; *Pelton v. East Cleveland R. R. Co.*, vol. 3, p. 215; *Mt. Adams, &c. Ry. Co. v. Winslow*, vol. 2, p. 262; *Tracy v. Troy & Lansingburgh Ry. Co.*, vol. 3, p. 227; *Rocky Mountain Bell Teleph. Co. v. Salt Lake City Ry. Co.*, post.

MOTION to dissolve preliminary injunction. The facts are fully stated in the opinion.

Hargis & Easton, attorneys for plaintiff.

Humphrey & Davie, attorneys for defendant.

STERLING B. TONRY, J.: This action was brought on the 9th of November, 1889, by the Louisville Bagging Manufacturing Company against the Central Passenger Railway Company, to [restrain the defendant, its agents and employees from erecting poles, or other necessary structures and appliances, and connecting wires therewith, by which electric cars were to be run over or used on Walnut street, or on the railroad track, or any part thereof, between Nineteenth and Twentieth streets, in front of the plaintiff's factory; and also to restrain the said defendant from using said posts, wires, structures or appliances in connection with electricity as a motor power on said Walnut street, between Nineteenth and Twentieth streets; and from using, placing, running, conducting or managing an electric street car railroad on said Walnut street, between Nineteenth and Twentieth streets; and from generating, making or using electricity as a motor power in conjunction with or on said electric cars along said Walnut street, in connection with said posts or wires; and from running, conducting or managing said electric cars on said Walnut street, between Nineteenth and Twentieth streets, and from the use of electricity in any way or manner, or to any extent, in connection with said street cars or electric cars on said Walnut street or any part thereof.

As a basis of this injunction, the plaintiff alleges in its bill of complaint that it is a corporation in the city of Louisville, existing under the laws of the State; that it had purchased ground and erected the building, between Nineteenth and Twentieth streets, on Walnut street, in the city of Louisville, and that said grounds and building

with its machinery, constituted plaintiff's factory fronting on Walnut street, one hundred and twenty-one feet west from Nineteenth street and running with said Nineteenth street more than two hundred feet deep; that the building and machinery were erected for manufacturing bagging; that the plaintiff owned and had occupied said building and machinery and conducted the business of manufacturing bagging for many years without interruption until July, 1889; that in order to ship the material and product and bagging manufactured in said factory, it was necessary to have ingress and egress to and from Walnut street in front of said building; that if the front of the said building and factory on said Walnut street is obstructed the said business and trade carried on by the plaintiff would be lost, and the value of the property and the machinery would be depreciated at least one-third of its value.

The plaintiff further states in its bill of complaint that it is the owner of the said grounds and buildings, machinery and factory, and all rights, privileges, appurtenances, easements and incidental benefits belonging thereto, including the right of way from the front doors of said building and factory into Walnut street, thence up and down Walnut street to the various depots of shipment in the city of Louisville, which can only be reached by the plaintiff by and over Walnut street, that it has a reversionary interest in said street, extending to the center thereof.

It further alleges that it is entitled to the use of the street without let, hindrance or obstruction, for the purposes of ingress and egress in carrying on its business of manufacturing bagging.

The plaintiff further states that for more than nineteen years last past it has used said Walnut street in front of its said buildings and factory by driving wagons into and on it, loading and unloading the same, from the doors of its said factory opening upon Walnut street, with its manufactured products, jute bagging, etc., manufactured in said manufactory and buildings.

The plaintiff states that the said defendant, the Central Passenger Railway Company, did on Wednesday night, the 6th of November, 1889, by its servants and agents, enter upon the pavement in front of the plaintiff's said factory, and adjoining the same, along said Walnut street, on the south side thereof; and dug up the said pavement, and without right or authority, set in the ground two large posts in front of the plaintiff's factory, which posts, the plaintiff avers, are an obstruction to the plaintiff's ingress and egress to and from its factory on the south side of Walnut street and in front thereof; that the posts were erected by the defendants for the purpose of attaching thereto the wires, attachments, apparatus and things to work and operate an electric car over the tracks of railway which had been recently made by the defendant in front of said factory and buildings along said Walnut street, and that the defendant, its agents and employees, were at the time of the filing of the bill erecting posts and attaching wires and other things thereto, in front of plaintiff's said factory, for the purpose of running said electric cars over said Walnut street at that point; and that said wires and posts are all being erected by the defendants above ground and over the heads of the people and public as they pass along said Walnut street at that point; and further, that the defendant was then preparing and threatening to erect, and causing to be prepared an electric plant for the generation of electricity to run said electric cars by the use of said wires over said Walnut street in front of plaintiff's said buildings, and were threatening to erect said wires and posts and connect the same in front of said factory and buildings, and to run electric cars along said Walnut street by the use of said posts and wires and other apparatus and means commonly used in doing the same.

The plaintiff further states that the same are of very great danger to and will put in constant jeopardy the lives of persons and property along said Walnut street, including this plaintiff and its employees, and are a

public nuisance, and also a private nuisance, especially affecting, injuring and damaging the said property of said plaintiff by destroying the ingress and egress to and from its property, and that it would also destroy the use of plaintiff's telephone in said factory, disarrange the time-pieces and keep in constant hazard the property of plaintiff by reason of said electricity, wires, structures and apparatus as aforesaid used in front of the plaintiff's said factory; that the said wires when put in connection with said electric cars are very dangerous, and that from the experience of persons conducting and managing electric cars by the use of electricity over wires above ground, it has been shown and is a fact that the lives of persons and of animals have been and will be destroyed by the falling or misplacing of said wires or the breaking thereof, and that such would be the case if the defendants were permitted to erect said wires and posts and put upon said railroads on Walnut street electric street cars and to use the same; that the electric cars would be run by the defendants with excessive and dangerous speed to the lives and property of citizens along Walnut street, and especially to the property of the plaintiff, and to its officers, employees and agents engaged in operating said factory.

The plaintiff further states that the defendant, before erecting said posts and apparatus, failed to have or cause condemnation proceedings to be instituted to condemn the property of the plaintiff above described, nor had the defendant made, or caused to be made, just or any compensation to the plaintiff for said property; that the plaintiff was without adequate remedy at law, and that the damage to it and its property would be irreparable.

These allegations are taken from the bill of complaint, and constitute the ground upon which a temporary injunction was issued herein.

To this petition the defendant filed its answer, denying that the acts of the defendant set forth in the bill of complaint were unlawful or injurious to the defendant or its property rights, and denied that its acts would obstruct

the ingress and egress to and from the plaintiff's factory ; it denied that the plaintiff was entitled to the use of said street without let, hindrance or obstruction, for the purpose of ingress and egress, for carrying on its business of manufacturing or shipping bagging, except to the extent that any other citizen is entitled to the use of said street ; and denied that the acts of the defendant complained of by the plaintiff would work damage or injury to the plaintiff or its property, or loss of trade, or that said acts would cause any permanent injury to said buildings or damages which could not be compensated in damages at law. It denied that the posts erected on the sidewalk in front of plaintiff's building or factory were in close proximity thereto, or that they were an obstruction to the ingress and egress of the plaintiff to and from its said factory. It admits that it had erected two posts in front of plaintiff's factory at the edge of the sidewalk near the gutter in front of said factory for the purposes set forth in the petition. It admits that it was preparing to run electric cars along Walnut street by the use of electricity, posts and wires and other apparatus and means commonly used for the purposes as alleged in said petition ; but denies that said acts were unlawful or prejudicial to the plaintiff or its property.

It denies that its electric plant for the generation of electricity, and its posts and wires and apparatus intended to be put in use for the running of cars by electricity on the railway track in front of plaintiff's factory are dangerous, or would put the property or lives of the citizens of Louisville, or of the plaintiff's employees or agents, in jeopardy, and denies that the same are, or were, a public or private nuisance, and denies any special damage or injury to the plaintiff or its property by reason of said erection or construction, or the imminent danger to the lives of plaintiff's servants or employees. It denies that the use of electricity on overhead wires attached to posts in connection with wires on the line of way, or anything which the defendant threatened to do, or was about to do, for the purpose of running its said electric cars on said track, was or is danger-

ous to the lives or property of the citizens on both or either side of said Walnut street, or that it was especially dangerous, or dangerous at all, to the plaintiff's property, or to the lives of its agents or employees. It denies that the use of electric cars on Walnut street will impede the travel, or that the said electric cars will be run by the defendants with excessive speed, or speed dangerous to the lives of citizens on Walnut street or elsewhere, or at a speed dangerous to the plaintiff, or to its employees and agents engaged in the operation of said factory, or that it would render the use of said building dangerous. It denies that the plaintiff is without adequate remedy at law for any injuries which it had or would sustain by reason of the acts complained of in said petition.

This paragraph of the answer puts in issue the material allegations of the petition.

In its third paragraph the defendant alleges that by its charter and amendments thereto it was granted the right to construct, maintain and operate a street car line with double tracks in the city of Louisville, through and along and over Walnut street from the eastern to the western limits of the city of Louisville; that the original act of incorporation was entitled, "An act to incorporate the Central Passenger Railway Company of Louisville," approved December 20, 1865; that all amendments thereto are referred to and made a part of its answer. It further alleges that by an act entitled "An act to amend the charter of the Central Passenger Railway Company," approved May 12, 1884, it was provided that the right of way was thereby granted to said defendant to operate its cars of all kinds by electricity. The defendant further states that by a resolution of the general council of the city of Louisville, which was duly approved by the mayor on February 23, 1888, and which was duly published as required by law, it was provided that the said defendant be and it is allowed to use electricity as a motor power on any and all its lines of street railway in the city of Louisville; and that by an ordinance of the general council of the city of Louis-

ville, approved by the mayor October 9, 1888, which was duly published as required by law, it was provided that this said defendant should have the right to use as a motor power, on any and all of its lines of street railway in the city of Louisville, electricity, and should have the right to erect all necessary structures and appliances thereto. That said charter and ordinances and acts are still in full force and effect. The defendant further states that in order to use electricity as a motive power for a street railroad, and in order to operate its cars by electricity, it is and was necessary for the defendant to erect said poles along the sidewalks and streets where its lines were built and where electricity was to be used on street cars, and that said poles and wires connecting the same, and the wires overhanging the tracks, are necessary structures and appliances for the use of electricity as a motor power for the operating of said street railroad of said defendant; that in pursuance of its right, grant and franchise to use electricity as a motor power for the operation of its said street car railroad along said Walnut street, and in pursuance of its said power and authority to erect such necessary structures and appliances as would enable it to use said electricity as a motor power, it had at the time of the commencement of this suit, and before, begun and was erecting such structures and appliances upon and along its line of street railroad on Walnut street from Eighteenth street westwardly to connect the same with the system of electric street railroad that was then running as far west as Eighteenth street on Walnut street; that it had been operating for a long time before the commencement of this suit a similar line of street railroad by electricity on Green street and other streets in the city of Louisville, and on Fifteenth street from Green street to Walnut street, and along Walnut street as far west as Eighteenth street, and that at the time the injunction herein was sued out, it was engaged in extending said electric railroad down Walnut street to the western limits of the city of Louisville; that the pole which it was about to place, or was placing

along Walnut street for the purpose of placing wires thereon with which to support the wire along which the electricity would be conducted for the operation of said street railroad, were being erected carefully and prudently and were being erected and were to be erected in the usual and common way of erecting them, as alleged in the petition, for the purpose of operating a street railway by electricity, and in the manner in which they are erected and have been erected by other street railways for the same purpose. That the system of operating street railways which it was then engaged in operating is known as the "overhead system of electric street railways," and that said system is a common and usual system adopted by electric railways throughout the United States and that more than one hundred and fifty street railroads are now being operated, and many have for a long time been operated, by electricity in various parts of the United States under the overhead system, which this defendant has established; and that the overhead system of operating street railways by electricity is being introduced into other cities and towns of the United States, and that said overhead system has in a great measure superseded all other methods of operating street cars by electricity or mules, or otherwise, and is the only practicable mode of operating a street railroad by electricity.

It further states that the defendant was about to place its poles immediately alongside of the curb line of the sidewalk, over one hundred feet apart, the poles to be ten or twelve inches in diameter at the surface of the sidewalk, and tapering about six or seven inches in diameter to the top, of about twenty-four feet in height from the surface; that the wires conducting said electricity are about twenty-one feet above the street; that the said street railroad is being built by and with the approval of the city of Louisville and its engineering department; that no alteration would be made in the grade of the street, nor would there be any increase of the number of railway tracks, and that only one pole will be located in front of the property of the

plaintiff on Walnut street, and that that will be located over ten feet from the plaintiff's property and at the edge of the gutter of the sidewalk ; that the said Walnut street is a public street and was dedicated to the public use long before the plaintiff became the owner of the property thereon, and was a public street and dedicated to public uses long before the plaintiff erected its factory on said property. It further states that the operation of said railway by electricity under the system adopted by the defendant is greatly safer and much more desirable than any other method of operating street cars ; that the current of electricity which passes over the wires and by which it is operated does not pass where any one can be hurt by it or where any property can be injured by it ; and it further says that the degree of strength of electricity which passes over said wire is not sufficient to injure property life or in case of breakage or of any one coming in contact with it ; that it is what is known as a continuous flow of electricity and not the alternating flow, and the electricity employed by defendant is not higher than five hundred volts, which is entirely safe ; that it proposes to operate its said road on the most approved plan and to operate it with the utmost care and in a safe and prudent manner ; and that the said electric railroad when completed will be of great benefit and convenience to the public and the citizens of Louisville, and to the plaintiff and its property and employees.

In its reply the plaintiff puts in issue the grants and franchises by the Legislature and the city ordinances and resolutions to the defendant to operate electric cars set up in its answer. It denies that the plaintiff had legal right under any act of the Legislature of Kentucky, or ordinance or resolution of the general council of the city of Louisville, to enter upon Walnut street between Nineteenth and Twentieth streets and build or operate an electric railroad thereon, or a street car railroad thereon, without first having made just compensation to the plaintiff, and denies that said act or acts of the Legislature or resolutions or ordinances of the city of Louisville gave to

the defendant authority to enter on said street and erect said electric railroads thereon. It denies that the Legislature of Kentucky and the general council of the city of Louisville had authority or power to authorize the construction of an electric railroad or cars on said Walnut street or any part thereof, to be conducted, managed, controlled or operated by the use of wires overhead. It denies that electric railroad cars are being operated in the cities and by the companies mentioned in the defendant's answer, and denies that the overhead system is the only practicable system, or that it is the one in common use. It denies that Walnut street was ever dedicated to the defendant or to its railroad system, or that the said street was ever dedicated except to the common use of the general public; and it denies that the interests of the public of Louisville, or the traveling public, require an electric railroad to be built on Walnut street, or that the electric system of railway is superior to any other kind of street railroad, or that it will be of great convenience to the public, or that it will increase the value of property along said railroad or make the property along Walnut street more valuable than property where there is no electric street railway, or where the railroads are operated by mules and horses. It denies that the operation of the said railway by electricity is safer and more desirable than any other mode of operating a street railroad, or that the current of electricity which passes over the wire or will pass over the wire, or by which it operates its said railroad, does not pass where any one is likely to be hurt by it, or where any property is likely to be injured by it. It denies that the degree in strength of electricity which passes over said wire is not sufficient to injure property or life in case of breakage, or any one coming in contact with it. It denies that the electric current used, or to be used, by the defendant company in propelling its street cars is not and never will be higher than five hundred volts, or that five hundred volts or two hundred volts is entirely safe, or safe at all, or that the continuous flow of electricity is entirely safe or safe at all. These are the issues pre-

sented by the pleadings in this case; upon which there has been taken voluminous volumes of evidence, ranging from the testimony of renowned expert electricians all over the country, to newspaper excerpts of the latest death of a mule killed by electricity in any part of the country.

With the pleadings and issues thus presented, upon the affidavits and proof filed herein, the defendant, under section 291 of the Code, having given notice to the plaintiff of the filing of the motion to be made in court, in not less than ten days thereafter, has moved to dissolve the injunction and to set aside the order granting an injunction upon the whole case. Said section provides that upon such motion each party may read depositions and other competent evidence in writing. Thus it will be seen that the motion now before the court is a motion upon the whole case to dissolve the injunction or set aside the order granting the injunction. Section 392 of the Code provides that after hearing the motion, the court or judge shall overrule it or dissolve it or modify it according to the rights of the parties.

The injunction in this case was simply to prevent any electric road being operated by the defendant in front of the plaintiff's bagging factory on Walnut street, between Nineteenth and Twentieth streets. It is not to prevent a double track railroad being operated by mules or horse power, but only to prevent electricity being used as a motor power on any track on Walnut street, near Nineteenth street, in front of plaintiff's factory, and to prevent the construction of the apparatus and appliances in that locality which are necessary and essential to the operation of an electric street car. The question whether or not a double track may be constructed and operated on that street is not the question before the court. This is a subject of litigation in case No. 3,632 in this court which was filed September 20, 1889. This was an action by the plaintiff to enjoin the defendant against doubling the track along Walnut street in front of its factory. That case has not been submitted, and is not on trial. When this action was instituted, there was a double track railroad being operated

by the defendant upon Walnut street in front of the plaintiff's factory, and it had been and was operated by horse power; and the object and gravamen of this suit for injunction is to prevent the defendant from converting its double track horse railway into an electric railway, in front of plaintiff's factory.

There are many issues of fact raised by the pleadings. It may be observed that the issue as to whether or not the Legislature of Kentucky and the general council of the city of Louisville had granted the defendant the express right and power to use and employ electricity as a motor power for propelling its street cars along its street railroad track on Walnut street in front of the plaintiff's factory, cannot be a question of fact in dispute. They are matters of record. The special acts of the Legislature, the courts will take judicial notice of. The ordinances and resolutions of the general council of the city of Louisville, granting such right and power, have been specially pleaded by the defendant and the profert has been made of certified copies of said ordinances and resolutions.

The Central Passenger Railway Company was incorporated by an act of December 20, 1865; and by the second section of that act it was

Authorized and empowered to construct, maintain and operate a single or double track railroad, with all necessary and convenient tracks, in the city of Louisville, on Walnut street, from the eastern to the western limits of the city. (See Burnett's Louisville City Code, p. 613.)

By an act amending the said charter of the Central Passenger Railway Company, approved March 4, 1871, section 3, the Legislature provided as follows:

It shall be lawful for the city of Louisville, a majority of the general council concurring therein, and the Central Passenger Railway Company of Louisville, to change, alter or amend any contract or agreement heretofore made in relation to the motive power to be used in propelling the cars on its tracks. (Burnett's City Code, p. 616.)

By another act of the Legislature, approved May 12, 1884,

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amending the charter of the Central Passenger Railway Company, it was provided as follows:

The right is hereby granted to the Central Passenger Railway Company to operate its cars of all kinds by the cable system, or electricity, or such other power as may be approved by the general council of the city of Louisville. (Burnett's City Code, p. 617.)

By another act of the Legislature, approved March 3, 1886, amending the charter of the said defendant company, it was enacted as follows:

The Central Passenger Railway Company shall have the power and authority to build, maintain and operate street car lines on the streets and alleys and routes granted through its charter or by ordinance of the general council of the city. * * * Its said lines may be operated by any motive power now authorized in said charter as amended.

The amendments include the amendment of May 12, 1884, above quoted, expressly authorizing electricity to be used as a motive power.

And said act further provided as follows:

Hereafter said council may, by ordinance or resolution, grant to said company the right and authority to build and operate such lines on routes, and on such terms and conditions as may be agreed on between said company and the city general council. (Acts of 1885-6, vol. 1, p. 526.)

Thus it is clear that the defendant had authority from the Legislature and from the city council in pursuance of the power conferred on said council by said Legislature, to build its tracks in the city of Louisville wherever the general council would permit it, and also an express grant of the right to operate these tracks with electricity as a motor power, and also it had express legislative permission to change the motive power and to operate the cars by any motive power which the city might authorize; and in its original charter there is an explicit grant from the Legislature of the right to build a double track railroad from one end of Walnut street to the other.

These legislative grants were so explicit that no author-

ity from the general council of the city was requisite to authorize the defendant to construct tracks from the eastern to the western end of Walnut street and to operate it by electricity ; but the city of Louisville, as we have seen, on three separate and distinct occasions, has given authority to the said defendant to operate its said railroad track by electricity as a motor power ; first, by a resolution approved February 23, 1888, which resolution provided as follows :

The Central Passenger Railway Company shall have and it is hereby allowed to use either the cable or electricity as a motor power on any and all of its lines.

Second, by a resolution approved October 9, 1888, as follows :

Resolved, that the Central Passenger Railway be and it is hereby granted the right * * * to use as a motive power, on any and all of its lines in the city of Louisville, either animal, cable, electricity, or any motive power other than steam, and to erect all necessary structure and appliances therefor.

Third, by a resolution passed December 20, 1889, in words as follows :

Resolved by the general council of the city of Louisville, that the Central Passenger Railway Company be and it is hereby granted the right to extend its double track railway on Walnut street from Eighteenth street west to the city limits, and to operate the same by animal power, or in the manner and with the appliances that the Green street, Fifteenth street and Walnut street route is now operated ; the work to be done under the supervision of the city engineer.

The manner and appliances with which the Green street, Fifteenth and Walnut streets routes were then operated was by electricity. Thus the defendant has the express permission from the general council to extend the double-track railway on Walnut street from Eighteenth street west to the city limits. The fact cannot be disputed that the defendant in the assertion of its right to construct and

operate a street car line by electricity on Walnut street in front of plaintiff's factory is armed with both legislative permission and with the ordinances and resolutions of the city council of Louisville to that effect.

But, says the plaintiff, admitting that these acts of the Legislature and these resolutions and ordinances of the city were passed, it was not within the constitutional power of either the Legislature or the general council to make this grant. This is the first question to be considered.

In *Lewis on Eminent Domain*, section 116, it is said: "The city having power to give such sanction (that is to a street railroad), and not being restricted to any particular mode, may do so by resolution or vote as well as by ordinance."

Says Mr. Dillon in his work on *Municipal Corporations*, volume 1, section 367 and note:

"Where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be by vote or by resolution and need not be by an ordinance. A resolution has ordinarily the same effect as an ordinance, as both are legislative acts."

The learned counsel for the plaintiff insist that the Legislature had not the power to delegate to the city council authority to authorize the defendant to use electricity in operating its street railroad.

Says Mr. Cooley in his work on *Constitutional Limitations*, page 140, on this point:

"We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and are commonly bestowed on them, and the bestowal of which is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in view of the immemorial practice of this country and England, which has always recognized the propriety and policy of vesting municipal organizations with certain powers of local legislation, in respect to which the parties immediately interested may be fairly supposed more competent to judge of their needs than any central

authority. As municipal organizations are mere auxiliaries of the State government in the important business of municipal rule, the Legislature may create them at their will."

And Mr. Dillon on Municipal Corporations, section 308, says: "Although the proposition that the Legislature of a State is alone competent to make laws is true, yet it is also settled that it is competent for the Legislature to delegate to municipal corporations the power to make by-laws and ordinances with appropriate sanctions, which, when authorized, have the force in favor of the municipality and against persons bound thereby, of laws passed by the Legislature of the State."

And in section 724, the same learned writer, discussing the question whether or not a city council has the right to grant to a street railway the right to operate along the streets of the city, says: "The Legislature may delegate to municipal or local bodies the right to grant or refuse such authority, * * * and the ordinary powers of municipal corporations are usually ample enough in the absence of express legislation on the subject to authorize them to permit or refuse to permit the use of streets within their limits for such purposes."

The various city charters of the city of Louisville have always contained clauses authorizing the city to grant the right to street railroads to lay their tracks and operate their cars along the streets. In the case at bar, therefore, we find that the defendant not only has the explicit grant from the Legislature itself to operate its street car line on Walnut street with electricity, but it also has within the various grants by the city council of Louisville the express powers and permission to operate its street cars by electricity on said street, and to construct the necessary and proper appliances and apparatus therefor, and to construct and operate the same appliances and apparatus which were used to operate the Green street line, which, as we have seen, were appliances and apparatus used in connection with electricity as a motor power for its said operation.

But, says the learned counsel for the plaintiff, these acts of the Legislature and the general council are unconstitutional; and neither the Legislature nor the city could grant the right to operate an electric railroad, or indeed any double track railroad down Walnut street, without first condemning the right of way and making compensation to the plaintiff. In other words, the plaintiff's learned counsel insist that the operation of street cars by electricity and the construction of appliances and apparatus necessary for such operation along Walnut street in front of the plaintiff's factory is an additional servitude upon said street, which must be condemned and paid for before it can be granted by the Legislature or by the city.

Lewis on Eminent Domain, section 124, says: "It has been determined in numerous decisions and without dissent, except in the State of New York, that the use of a street by a horse railroad constructed and operated in the ordinary manner, falls within the purposes for which the streets are established and maintained, and consequently, that for any damages resulting from such use the abutting owner of property can recover no compensation, whether the fee of the street is in him or in the public."

And in the same section (124) he further says: "The cars of an ordinary street railway may be propelled not only by animal power but also by steam or electricity, either in the form of the cable or simple locomotive; the manner of laying down the track and the shape and size of the rails, the weight and size of the cars and the motive power are all incidental circumstances, all subject to change and modification as new principles are discovered or new improvements made."

In Dillon on Municipal Corporations, sections 722 and 724, the rule is laid down as well established that the Legislature and the municipal authorities have the power to grant the right to operate a street railroad through the streets of a city, and that it is not a new servitude thereon.

In Cooley on Constitutional Limitations, page 682, it is said:

"A horse railway, as a general thing, will interfere very little with the ordinary use of the way by the public even upon the very line of the road, and, in many cases, it would be a relief to an overburdened way rather than an impediment to the previous use."

And in section 688 the same author says:

"When land is dedicated for a street, it is unquestionably appropriated for all the ordinary purposes of a street, not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use of heavy carriages which run upon a grooved track; and the appropriation of important streets in large cities for their use is not only a frequent necessity which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving."

In *Texas & Pacific Railroad Company v. Rosedale Street Railway Company*, 64 Texas, 683, the court, in discussing this very question, said:

"This question has undergone thorough and critical examination in the Supreme and Appellate Courts of several of the States, and it seems that with the exception of one adjudicated case, they all agree that the construction and operation of a horse railway on the public streets of a city by authority from the city government is not such a new and additional burden imposed upon the land as would entitle the owner of the fee to compensation therefor, or that would amount to such a taking and damage as would require the condemnation of the right of way."

The learned court further said that the only case to the contrary was in 39th New York, which was decided by a divided court, and has since been modified in that State.

The same learned court, in speaking of street railways, said:

"Doubtless the passing of wagons, drays, omnibuses and other vehicles interferes with the operation of the plaintiff company quite as much as would result from the passing street cars. As long, however, as a street remains a public

thoroughfare, appellant would not be heard to complain of such inconvenience; because they are the ordinary and usual modes of conveyance used by the public. So it may be replied that the street railway is included among the usual modes of conveyance along the streets of a city, and although in some respects inconvenient, this must in the interest of the general public be acquiesced in by all parties."

In section 636 of Lewis on Eminent Domain, it is said:

"It has already been shown that a distinction is made in some of the States between horse railroads and steam railroads; the former, the horse railroads, being held to be a legitimate use of the street as a public highway. According to this view, the abutting owner has no more ground of complaint in case a horse railroad is laid down and operated in front of his property than he would have if a line of omnibuses was operated on the street."

Our own Appellate Court, in *Fulton v. Short Route Railway Transfer Company*, 85 Ky., 650, said that "however much a conflict of authority may exist anywhere else, it is not now an open question in this State." And it held that the Legislature and city council had a perfect right to grant the right of way to either steam, horse or any other kind of railroad operating along the streets, and that the adjacent property owner has no right to claim damages therefor.

And to the same effect is the still later case of *Heyland v. Short Route Railway Transfer Company*, reported in 10th Ky. Law Reporter, page 900.

This question recently came before the Supreme Court of Rhode Island, in the case of *Taggart and others v. The Newport Street Railway Company*. That was an action by the abutters on certain streets in the city of Newport in that State, along and over which the tracks or wires of the defendant company's street railway had been laid, to enjoin their construction and use. The object of the action was to have the company enjoined from erecting or maintaining certain poles or wires in the streets in front of their

property. Poles were erected to stretch the wires oversaid tracks for the conduct of electricity, which was used as a motor for the passenger cars traversing said tracks. The poles were placed along the margins of the sidewalks of said streets about one hundred and twenty feet apart, and were placed there by permission of the council of the city of Newport, given by an ordinance. The case was submitted on bill and answer, the facts being admitted.

The bill charged several grounds for relief, the second of which was that the right to use electricity was not given in the grant by the ordinance of the city. The language in regard to the powers to be used was that the road should be operated "with steam, horse or other power," as the councils of said cities and towns may from time to time direct. The plaintiff insisted that the word steam must be struck out because it had been decided that steam could not be used without compensation to the owners of the fee for the non-servitude imposed and no compensation had been provided therefor, and because steam being struck out, "or other power" must be construed to mean other power similar to horse power, that is, animal power. Said the court:

"We do not find the argument convincing. Allowing that steam must be struck out for the reasons given, it does not follow in our opinion that 'other' must be construed to mean other animal power. Horse power is the only animal power which has ever been used for the traction of street railway cars in our northern cities. It is the only animal power which could have occurred to the general assembly as fit to be used. The suggestion that 'other power' may mean mules cannot be entertained. The act of incorporation was passed in the winter of 1885, when the idea that electricity might be brought into use as a motor was already familiar; and nothing seems more probable than that the words 'other power' were inserted with the view to its possible employment. We do not think the second ground is valid."

The third ground was that the erection of the poles on the

sidewalks to hold up the wires in connection with the operation of the electric plant, was an invasion of the property rights of said abutters, for which compensation should be made. The court said:

"The poles are certainly in a portion of the streets not occupied by the tracks, but they do not encumber that portion in the meaning of the word as it is used. The poles are very slightly in the way of travel, being placed as hitching posts, lamp posts, electric light poles, telegraph and telephone poles are placed, near the front margins of the sidewalks. * * * We have already decided that the council has the power by section 5 to authorize the use of electricity, so that the question is only as to the manner of using, and as to whether the council has the power to authorize the use in said manner.

"It seems to us that the provision that the cars on road shall be operated by steam, horse or other power, as the council of said city or town may from time to time direct, is broad enough to empower said council not only to authorize the use of electricity as a motor, but also to authorize its use by means of any system of application which it approves as suitable. Our conclusion is that the power conferred by section 5 is not qualified by the concluding words of section 7, and that the poles complained of having been erected under section 5 as part of the apparatus for supplying the railway with its motive power, are to be regarded as not encumbering the streets but as ministering to their uses and increasing the facilities for travel which they afford to the public."

The fourth ground upon which the plaintiff in that case relied was that the act of incorporation which authorized the use of electricity for the operation of said street railways, and the erection of poles as auxiliary thereto, was unconstitutional and void, because it authorized the imposition of additional servitude upon the streets without providing for any additional compensation to the owners of the fee of the said streets.

"We think," said the court, "it is settled by the greater
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weight of authority that a railroad constructed in a street, and operated by steam in the usual manner, imposes a new servitude and entitles the owner of the fee to additional compensation; but a street railway operated by horse power, as such street railways are ordinarily operated, does not impose any new servitude, and does not entitle the owner of the fee to any additional compensation." Citing numerous authorities.

"The distinction is often stated as a distinction between steam and horse railroads; but the distinction properly rests not on any difference in motive power, but in the different effects produced by them respectively on the highways of streets which they occupy. A steam railroad imposes a new servitude, not because it is operated by steam, but because it is so operated as to be incompatible with the use of the street; in other words, so as practically to exclude the usual modes of its use. *Pierce on Railroads*, 234.

"A steam railroad on a street so operated as to be consistent with the use of the street, in the usual modes of its use, has been held not to impose a new servitude. Citing *Fulton v. Short Route Railway Transfer Company*, 85 Ky.

"It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion." *Briggs v. Railroad Company*, 79 Maine, 363.

"An ordinary street railway, instead of adding a new servitude to a street, operates in furtherance of its original uses, and, instead of being an embarrassment, relieves the pressure of local business and local travel."

In conclusion the court said: "We see no reason to suppose that this form of danger—that is, the supposed alarm to horses by electric cars—is so great that on account of it the defendant railway should be ruled as an additional servitude."

"But," continues the court, "assuming that telegraph and telephone operation of wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the operation of said electric street railway

creates a new servitude. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or very indirectly so; whereas the poles and wires of this electric railway street car company are directly ancillary to the uses of the street, as such, in that they communicate the power by which the street cars are propelled. It has been held, for reasons which were considered irrefragable, that a telegraph erected by a railroad company within its location for the purpose of its railroad, to increase the speed and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally acquired." *Telegraph Company v. Rich*, 19 Kansas, 517.

"Our conclusion is, that the plaintiffs are not entitled to the relief prayed for on the grounds alleged, and that their bill should be dismissed with costs." *Taggart, etc. v. Newport Street Car Railway Company*, Supreme Court of Rhode Island, January, 1890, and reported in the *Atlantic Reporter*, vol. 10, number April 2, 1890.

These authorities dispose, in our opinion, of the contention of the plaintiff, that the conversion by the defendant of its horse cars into electric cars on Walnut street, in front of its factory, and the construction of poles and appliances necessary for the operation of said cars by electricity are, or constitute, a new servitude upon the street, entitling the plaintiff to compensation therefor. The plaintiff is concluded by the averment in its petition to the effect that the defendant was erecting its said wires and poles, and connecting the same in front of its factory and buildings, for the propulsion of electric cars along said Walnut street, by the use of said posts and wires and other apparatus and means commonly used in doing the same.

The plaintiff complains that by the construction and operation of said electric cars along said Walnut street in front of its factory, it is prevented from backing its wagons, at right angles to the street, up to its sidewalk, in order to load and unload its said wagons in front of its said factory.

The proof shows that a wagon backed up against the sidewalk at right angles to the street in front of plaintiff's factory, with horses hitched thereto, would necessarily, by reason of the length of the wagon and horses, put the horses on the railroad track; and the proof further shows that such has been the use and custom of the plaintiff for many years in its business.

The question is, has the plaintiff such a legal right vested in it to back its wagons at right angles to the street, or to the sidewalk, in the prosecution of its business, in such a way as to obstruct the passage of street cars?

Says Lewis on Eminent Domain, section 125: "The abutting owner of property upon a street has no easement in the street for backing up teams to the sidewalk for the purpose of loading and unloading freight; and the interference with such use of the street by operating horse railroad cars thereon is no ground for an injunction or suit for damages in favor of said abutter. The fact that the track is placed on one side of the street instead of the middle, or so near the curbstone as not to leave room for a carriage to stand while the cars are passing, makes no difference in the right to damages."

In Dillon on Municipal Corporations, section 627, it is said: "The obstruction of the right of an owner of a store to have drays or vehicles standing transversely on the street while discharging goods was not such an injury as to give a right of compensation."

In the case of *Hobart v. Milwaukee Street Railway Company*, 27 Wisconsin, 194, reported also in 9 American Reports, 461, the following language was used by the court: "The building upon the premises is a store used and occupied by the plaintiff as a wholesale merchant, and into and from which many heavy articles have to be constantly received and taken in wagons and drays, which are loaded and unloaded in front of the store and upon the street in question. The custom as described by counsel and as fully shown by affidavit, is to back wagons or drays up to the curbstone or sidewalk and discharge or receive

freight to and from the store across the sidewalk. The laying of the rails and running of the cars on that side of the middle of the street where the store is, though near the middle, will interfere with and prevent this custom. Sufficient space will not be left between the curbstone or sidewalk and railway track for teams or wagons or drays to stand at right angles with or crosswise of the street. The heads of the horses will come in contact with the passing cars. Such is the obstruction of which plaintiff complains or the private or peculiar injury for which he seeks redress. Has he any such private right or easement in the street in front of his store? It is clearly our opinion that he has not. The public authorities may permit such use of a street so long as they please, or until the public convenience demands it should cease, but the plaintiff cannot insist upon it as a right in himself. When the space thus occupied by his teams is required for public travel, or the passage of vehicles of any kind authorized by the public, his occupation becomes an obstruction and a nuisance, and he must turn his teams the other way or lengthwise of the street, which may be done, and the loading and unloading take place without any great or additional trouble or inconvenience to him. At all events, he has no right to insist upon such use and occupancy of the street when the public authorities have signified their unwillingness, as they have done, by authorizing the laying down of the railroad track in question."

And in Rorer on Railroads, vol. 2, page 1,426, the learned author says that a merchant has no right to back his wagons up at right angles with the course of the street to unload or receive freight, if such backing up interfere with the street car line authorized by the city along the street. He might run his wagons lengthwise, or unload them at times when the street cars are not there.

Street car companies are common carriers; they perform a public service, and should be protected in the lawful and legitimate enjoyment of their franchises. The rights of the traveling public in street cars are superior to those of the

private citizen. Individual convenience should be surrendered for the public good. If the plaintiff has been in the habit of using, as it has been alleged, and monopolizing the street and sidewalk in front of its factory, such use or custom cannot ripen into a legal right. *Malus usus abolendus est.*

So in the case in 17 New Jersey Equity, page 84, the court said, in an action similar to the one now on trial:

“Where the laying of the track and the use of the road are authorized by the municipal authorities, its location rests in the discretion of the corporation and those having the control and regulation of the streets.” And the court dismissed the bill for an injunction.

It follows, therefore, that the erection of posts and the construction of apparatus necessary for the successful and safe application and use of electricity as a motor power for the propulsion and traction of street cars over and along the tracks of street railways is not applying the street to any purpose incompatible with any one of the ends of its original dedication and establishment. On the contrary, as we have seen, it is auxiliary, ancillary and conducive to the aims and contemplated purposes of its original dedication. The proof shows that the operation of electric cars will not obstruct the plaintiff in the least in the fullest enjoyment of the right of ingress and egress to and from its factory and works, nor of an easy and convenient outlet to other streets. It is true, the plaintiff can not any more, as it has been wont illegally to do, back its teams against the sidewalk in front of its factory at a right angle with the street, in order to load and unload them. This was a permissive license, a sufferance to it, to be abrogated at any time the interest of the public might require it, rather than a legal right on the part of the plaintiff to so use the street. The proof shows that nothing that the defendant has done or proposes to do in connection with the use of its electric cars on said street, interferes with the reasonable use of the street by the plaintiff and by the public as a passway for foot passengers,

horsemen or vehicles in ordinary and general use. How, then, can it be seriously insisted that the use of the street by the defendant in operating its electric cars thereon is a taking away of the private property of the plaintiff for a public use? What reasonable use, legal easement or service of the plaintiff in the street has been, or is about to be, invaded or impaired by the defendant? As far as the plaintiff's right in the use of the street is concerned, there certainly is none.

But the plaintiff further insists upon another ground for the relief he seeks, viz.: That the electric batteries and apparatus for the use of the electric cars causes its telephone to buzz and obstructs its right to use its said telephone and its hearing as distinctly at certain times as at others. The plaintiff alleges, however, that its telephone buzzed before the street car line was built in front of its premises; and it is difficult, therefore, to see how the operating of the street car line in front of its factory will cause its said telephone to buzz, when said buzzing in its telephone existed before the said street car line was projected in front of its said factory. Whether, therefore, the injunction is made perpetual or dissolved, will not affect the buzzing of plaintiff's telephone; because the relief here sought by injunction is to prevent the operation of electric street cars in front of plaintiff's factory between Nineteenth and Twentieth streets, on Walnut street.

The preliminary injunction granted in this case enjoined the operating of electric street cars on the street railway track in front of plaintiff's factory; and also enjoined the construction of poles and apparatus and the laying of wires from pole to pole across said street in front of plaintiff's factory, which were necessary for the operation of said electric cars; therefore, the obstruction of the enjoyment of the plaintiff's telephone could not have been caused by the grievance of which the plaintiff complains; nor is it clear to the court that even if the defendant's batteries, plant and apparatus used in its entire system of street railways did cause the buzzing in the plaintiff's telephone, by which it was prevented from hearing as well

at some times as at others, it would follow that the plaintiff would have the right on that account to enjoin altogether the operation of said electric street car system ; for in *Warren v. The Louisville Coffin Company*, in 78 Kentucky, 408, the Court of Appeals of this State decided that persons who live in cities derive certain advantages by reason of the fact that all kinds of business are carried on around them, and that they must suffer disadvantages and inconveniences arising from the noise and bustle which is incident to city life. Such jarring or buzzing in a telephone are not such injuries and inconveniences as authorize injunctions from courts of equity.

In *Crosby v. Owensboro R. R. Co.*, 10 Bush, an injunction was sought because of the noise and rumble, jarring and shaking by passing trains ; the court held that they were indeed inconveniences, but not such as to warrant an injunction. And the same doctrine was laid down in *Fulton v. Short Route Railway Transfer Company*, 85 Ky. ; and to the same effect in *Applegate's case*, in 10 Dana, and *Brown's case*, in 17 Ben Monroe, and *Foot v. Newport Bridge Company*, 9 Bush ; *Heyland v. Short Route Railway Transfer Company*, 10 Ky. Law Reporter, 900. All these cases hold that inconveniences, such as a buzzing noise in a telephone, or noise of a passing train, afford no ground for an injunction.

Another ground upon which the plaintiff resists the defendant's motion, and upon which it predicates its demand to have the injunction made perpetual, is that the operation of the electric wire in front of its factory would be an overhanging nuisance, fraught with impending danger and peril to the lives of its employees and its property. The plaintiff insists that the operating of street cars by electricity is necessarily so dangerous to life and property as to constitute a public nuisance, and that particularly, as far as the plaintiff is concerned, by reason of the special danger to its property and the lives of its employees, it is a private nuisance.

If it be conceded that the use of electricity as a motor power

for operating and propelling of defendant's street cars on all the public highways in the city of Louisville is a public nuisance, the plaintiff can not champion the cause of the public, and have it abated or restrained, unless it can show a special particular injury resulting from said nuisance to itself or its property, peculiar and distinct from the injury or damage which the public in general suffers from said nuisance. This doctrine was announced by this court in *Williamson's case*, which was affirmed by the Superior Court (10 Ky. Law Reporter, 591). It is an elementary doctrine of common law, and needs no authority to sustain it.

So far, therefore, as the plaintiff seeks to enjoin the operation of electric cars on Green street and Fifteenth street, and any other street in the city of Louisville, on the score that it is a public nuisance, the court will not listen to it, nor allow it to thus become the champion of the public to redress its grievances ; but in so far as it alleges that the construction and operation of electric street cars in front of its factory on Walnut street is an impending menace to the lives of its employees, and puts its property in danger of destruction, the court will lend it a listening ear, and examine with scrutiny all the evidence in the case, to see whether its complaint is well founded.

This brings us to the question which is the all important one in this case, and upon the decision of which the plaintiff must stand or fall ; and that is whether the operation of electric street cars by the overhead trolley wire system, which is the mode, manner and system adopted by the defendant for operating and propelling its street cars, is *per se* dangerous to life or property ; and whether, if the defendant be allowed to construct and operate its said electric street cars upon said Walnut street in front of this factory, it would involve hurt, risk or inconvenience or danger to the property of the plaintiff, or to the lives of its officers or employees.

The plaintiff has taken an immense quantity of depositions and copious and diffuse volumes of testimony as to

what is electricity, and the manner in which it is utilized and governed ; and bold experts have given their definitions as to what it is, and the principles upon which it acts.

Cicero was asked, "What is life?" He answered, "*Animus ignis vel spiritus nescio.*" And so of electricity. It is as mysterious as the mind that tries in vain to comprehend it. It is impossible that we should know anything of it beyond the phenomena which it exhibits. Its physical character, its essence, its constitution and absolute nature can never be known to man. Whether it is an impulse, a tendency, a power, energy or force—whatever it is—all that man can know of it is the physical fact that under certain conditions by certain complicated material processes, which his inventive genius has devised for developing into active agency this impalpable, gigantic energy of nature which fills the universe and is so essential to its magnificent harmony, it will produce certain results and develop certain powers. Without knowing its essence, man has learned, by cunning mechanism, how to direct its wonderful energy. It is of a kin, no doubt, to all the members of the family of physical mysteries with which we can never form acquaintance, and of which we know nothing beyond their phenomena. The wind, the influence of planetary bodies upon the tides, gravitation and magnetism, the forces of repulsion and attraction, are its contemporaries in the physics of the material universe.

That these invisible agencies of nature are in continuous and tremendous operation we can not doubt ; but what they are, or what are the causes and purposes of their operation, we can never know, any more than we can understand the principles upon which the invisible Ruler drives the wondrous machinery of His universal government across the ocean of time. *Felix qui potuit rerum cognoscere causas.*

To the untutored, it is astonishing to see an electrician inflame gunpowder with an icicle ; but not less strange is it to see this mysterious force propelling with absolute obedi-

ence to the human will the tremendous machinery in great factories, and illuminating our great cities, and driving street cars along their municipal highways.

There are three processes or systems known to electrical mechanics for the operation and propulsion of street cars by electricity. First, the storage battery system ; second, the underground conduit system ; and third, the overhead trolley wire system. The court has neither the time, nor the inclination, although the evidence is very voluminous on the subject, to go into a minute relation of the mode of construction and operation of each of these respective systems. It suffices to say that the evidence is overwhelming, by electricians and experts and practical street car operators, to the effect that the storage battery system has not proven to be a reliable success, and has been abandoned altogether in the United States. It may be that in the spacious fields of experimental science, some energetic inventor may yet discover a cue, or invent some plan, by which the storage battery system will become operative and practical ; but the evidence is absolutely conclusive that the storage battery system, as it now exists, and as now known to the electrical world, is as yet impracticable.

Little better can be said of the underground conduit system. It has been shown to be a failure wherever attempted ; and in level cities like Louisville, where water would collect in the conduit from rain or snow, it is impossible of operation. The proof shows that it has been abandoned ; and that no street railroad is operated by it at this time in the United States except for a short distance in Allegheny city, where it is operated on the slope of a hill, where the water can easily run out of the conduit.

The overhead trolley system is of two kinds—the single and double wire.

The experts examined with unanimity testify that the single wire overhead trolley system, which is the one operated by the defendant, is the only practicable and safe system. In over two hundred cities in the United States,

the single wire overhead trolley system for the propulsion of street cars by electricity is now in operation, and all of them are constructed just as the proof shows. The defendant's system in Louisville is constructed with the single overhead trolley wires, about fifteen to twenty feet in the air, right over the middle of the car, in the middle of the street, supported there by wires extending from pole to pole across the street, and properly insulated, and with the addition of guard wires one and one-half feet above, running parallel with the single trolley wire, to prevent anything falling upon it, whether other wires or other substances.

If any other system than the single wire overhead trolley system had been adopted by the defendant, the plaintiff might well have complained of its being unusual, and, therefore, experimental and dangerous; but the system which the defendant has adopted, and proposes to adopt, in the operation of its street cars, is in use, as the evidence shows, in over two hundred cities in the United States, and is being conducted in said cities with safety both to life and to property.

It certainly was the opinion of the local municipal authorities that the said system was safe; otherwise the city council would not, by its ordinance of December 20, 1889, have authorized the defendant to erect along Walnut street the same line of road and the same apparatus and appliances which the defendant had used for nearly a year on Green street; which is an electric single overhead trolley.

This system has received the approval and sanction of the judiciary wherever it has been attacked in the courts. In *Pelton v. East Cleveland Railroad Company*, vol. 22, page 67 of the Weekly Law Bulletin (an Ohio law journal), an adjacent property owner sought to enjoin a street railroad company from changing its horse cars to a single overhead trolley wire system. The case was fully considered on the evidence and on the law, and the court

decided that it was a proper change and entirely legitimate.

And so in Cincinnati, in the case of *Mt. Adams & Eden Railway Company*, the same question was considered by the Circuit Court; Justices SMITH, SWING and COX, sitting *in banc*, were unanimous in holding that the single wire trolley overhead system was harmless, safe and proper, and dissolved the injunction.

In the case of *Tracy v. Troy and Lansingburgh R. R.*, in the Supreme Court of New York, a preliminary injunction had been granted to prevent a change from a horse railroad to the single wire trolley overhead system. After a full hearing of the evidence and law the court dissolved the injunction.

I have recently read with interest the report of the committee of the United States Senate, of which Mr. Ingalls was chairman, relative to street electric railroad cars, which report was adopted by the Senate. It was to the effect that an electric current of four or five hundred volts potential is not dangerous to human life. Upon this point the committee reported that the testimony was overwhelming and conclusive. The committee further reported that the only practicable system was and is the single wire overhead trolley system, the adoption of which it recommended for the operation of street cars in Washington city. In the case of *Rocky Mountain Bell Telephone Company v. Salt Lake Railroad Company*, in the third judicial district of the territory of Utah, this same question came before the court, and in January, 1890, it was decided by that court that a street railroad operated by electricity, under the single wire overhead trolley system, was entirely safe and proper, and should not be enjoined.

My attention has been called to over a dozen articles in various scientific journals, on the subject of electricity as a motor power in the propulsion of street cars, and in all of them there is a striking consensus of opinion and statement, that street cars operated by the single wire overhead trolley system, with a voltage of not exceeding five

hundred volts, is safe and proper, and a great improvement over horse cars.

In an article by Mr. Edison in the *North American Review*—and it is known that Mr. Edison is a great enemy of high voltage in the use of electricity—he said, that while he considered electric light wires of two thousand volts and more as dangerous in the extreme, that if they would reduce their voltage down to five hundred volts it would not be dangerous. He says: “The electric currents should be limited to six hundred or seven hundred volts.”

So that even with Mr. Edison, with reference to voltage, the danger line is fixed at seven hundred volts.

The proof in this case is, that the defendant, by the employment of its single overhead trolley wire system, uses and can only use between four hundred and five hundred voltage and not above five hundred volts; that all the electric power necessary for the greatest speed desired can be furnished within the limits of five hundred voltage; and there can not be found, in the proof, a single instance of a man or beast being killed or seriously injured by the overhead trolley wire system by reason of the electric current employed therein.

I have been cited to numerous newspaper excerpts, where employees of electric companies have been tangled mid air among innumerable electric wires and there burned to death by electricity; but nowhere does the evidence show that such calamities were caused by electric currents with a pressure of not over five hundred voltage.

The proof of all the experts is that it is impossible to kill a man or beast by a momentary or accidental shock from an electric current of five hundred volts. They all testify that a current of such pressure may be and is often passed through a man without hurting him.

The proof in this case shows that there are many instances where line men and construction engineers have received without injury the full force of a five hundred volt current. The proof shows further that the arc-light currents carry a pressure of from two to three thousand volts,

which is not only dangerous, but absolutely fatal whenever it comes in contact with man or beast. Other electric companies, for producing illumination and conducting other enterprises, employ wires with dangerous voltage, from one to three thousand volts.

The newspaper accounts of the killing of men and mules by electricity do not ascribe them to the overhead trolley wire system of operating street cars, which never employs a pressure of more than five hundred voltage, but ascribes them to electricity employed by electric lighting companies. The proof in this case shows that no case of fatal accident has ever resulted from electric railway wires carrying a current at a pressure not over five hundred voltage.

It is a physical fact, therefore, demonstrated by proof beyond a reasonable doubt, that the overhead single wire trolley system, adopted by the defendant for the operation of its street cars, does not involve danger to the property of the plaintiff, nor to the lives of its officers and employees. The proof in this case shows that in the operation of street cars by electricity, there is less danger to the lives of foot passengers and to people upon the streets, than in the operation of street cars by mules and horses. The car is under the immediate physical control of the conductor.

The proof shows he can exercise a power of instant reversal of the motors; which power to reverse and stop the car increases with its speed. In no other system, it is shown by the proof, does this immediate power of control of the car by the conductor exist. What danger, therefore, there can be in the defendant's operation of its street cars under this system to the factory of the plaintiff, or how said operation will deprive the plaintiff of the reasonable and ordinary use of its factory, it is impossible for the court to understand.

The plaintiff says that electricity, and its operation, not being fully understood, is *believed* to be dangerous to the lives of those coming under or near the wires conducting the electric current, and that if the defendant is permitted to erect its posts and stretch its wires and construct its

apparatus and appliances for the use of electricity in front of its factory, it will so frighten the employees of the plaintiff that they will discontinue in plaintiff's employment, and that the plaintiff will thereby be deprived of the reasonable and ordinary use of its property as a bagging factory.

Such an argument is not convincing, nor satisfactory, to the court.

If the employees of the plaintiff are so ignorant or superstitious that they will desert their posts of duty in its factory through fear of electric currents conducted upon wires in the air over the public highway, let them go. Others of more intelligence, who can do better work, can be had in their stead. The court will not 'pander to their folly. It is true that electricity destroys life and property; but what of that? So will steam and gunpowder, and fire and water; but, when under proper control, when checked and guided by the laws and reins of science, these mighty forces of nature are as harmless as they are invaluable to the necessities of man.

Having examined all the evidence in the case, and all the accessible literature upon the subject, with the care which the importance of the issue involved demands, the court is convinced that the injunction should be discharged, or rather, that it should never have been granted, and, therefore, sustains the defendant's motion to set aside the order granting the injunction, and discharges the same, at the costs of plaintiff.

NOTE.— This case is cited as an authority upon the proposition that electric street railways impose no additional servitude, in *Detroit City Ry. Co. v. Mills*, *post*.

See note to that case.

SAMUEL LONERGAN V. LA FAYETTE STREET RAILWAY
CO. ET AL.*Circuit Court, La Fayette, Indiana, July 9, 1890.*

(From private print.)

**ELECTRIC RAILWAY.—RIGHTS OF ABUTTING OWNERS.—LIABILITY TO
FRIGHTEN HORSES.—CONSTRUCTION OF STATUTE.**

A State Legislature has the right to authorize the erection and maintenance of street railways, including those using electric motors, and to delegate such right and power to municipalities, and this even when the fee of the street is in the abutting owners; such use of streets being not extraordinary or inconsistent with the public easement.

The allegation in a complaint that horses not long accustomed to electric motor cars are wont to become frightened thereat, and that thus the streets through which such railway passes become unpopular for travel, thereby lessening the value of the property of an abutting owner, does not raise the legal conclusion of an additional burden upon the street, and is demurrable.

In construing a statute enacted before the days of electric railways authorizing the construction of "street or horse railways," the Legislature will be presumed to have intended the use of such improved motive power as future invention might produce and public utility and convenience require: and thus the statute should be given a construction broad enough to include the use of electricity.

HEARING of demurrer to complaint asking perpetual injunction.

Facts stated in opinion.

LANGDON, J.: The questions presented arise on the demurrer for a want of sufficient facts to the complaint asking for a perpetual injunction against the railway company, prohibiting it from operating its cars by electric power, and for damages for injuries suffered in consequence of the past use of that motor. The facts material to be noticed now are, that the plaintiff is and was, before the construction of the defendant company's railway, the owner

of a lot abutting on Main street, near its western extremity, in Lafayette, together with the iron works and blacksmith shop thereon, where he is, and has been, operating the same. Main street runs east and west, and is the principal thoroughfare in the city, and its west end connects with a highway which passes over a bridge across the Wabash river and continues to the town of West Lafayette, the other roads thence radiating in different directions to the west part of the county. That at present the bridge is being replaced by a new one, and travel is temporarily over Brown street bridge, spanning the river some four blocks north of Main street. That all travel and traffic from the west side of the county used Main street bridge, and will use it again on its completion, and pass along in front of the plaintiff's place of business, as it formerly did, unless prevented by the acts of the defendant company. That in 1882 the defendant obtained a license from the city of Lafayette, to build and operate its railway over the center and along the entire length of Main street, by horse or electrical power, and in 1887 the board of commissioners of the county granted the company a permit to construct and operate its railway over the Main street bridge and highway to West Lafayette, and in pursuance of these respective grants, the company constructed its tracks and operated its railway by horse power. That the use of horse power only tended in a small degree to depreciate the value of the plaintiff's lot, or impair the plaintiff's business. That afterward the company erected a plant for the generation of electric power, erected poles, laid and suspended wires, and equipped its cars with dynamos and motors, and by means of these appliances commenced to operate its cars, and now is, and ever since has been, operating the cars by the same power, and causing them to pass over its tracks every five or ten minutes during the day and part of the night. That by the use of electrical power the cars are moved more rapidly than formerly, and without any visible means of locomotion, and they make a loud pulsating noise and humming sound, and produce,

when in motion, flashes of electric light, and especially in damp weather and in the night, and horses not long accustomed to these noises and lights are frequently frightened and rendered uncontrollable, and accidents thereby occur. That by reason of these causes of fright to horses, apprehension of danger in the use of Main street has become widespread, and has thereby driven some people and business from that street, and especially has the business of the plaintiff been diminished, and if the company shall be permitted to continue to operate its cars by the same power, the diminution in the value of the plaintiff's business and lot will be aggravated; that the damage to his business, by reason of the use of electric motors, has been \$200 a year.

It is alleged that temporarily the company is operating its road to the foot of Main street, pending the construction of the new bridge, which will be completed within sixty days, and the company is asserting its intention to lay and operate its road over the bridge when completed, and west of it with an electric motor, and that by reason of the construction of the bridge and highway, their use by the general public, in common with the company, would be exceedingly dangerous to persons with horses, in consequence of being met or overtaken by the cars and thrown from the embankment of the highway, and otherwise injured, by reason of fright to horses, and the consequence will be to divert a considerable travel and traffic from the Main street bridge to the Brown street bridge, and thereby impair the value of property and business on Main street.

It is then alleged that neither the common council of the city nor the board of commissioners had any power to authorize the use of Main street, or the bridge or highway adjoining, for the purpose of operating a railway by electrical power, and that the grants made by them are void, wrongful and injurious to plaintiff's property, rights and business. That the company claims the right, and threatens to continue the use of its electric cars on Main

street and bridge for twenty-one years, the time mentioned in its license. Prayer, as stated, for perpetual injunction, \$500 damages and general relief. It should be borne in mind that for the purpose of this case, according to the allegations of the complaint, that all the ordinary conditions usually found in the construction and operation of a horse railroad are present in the defendant company's railway, excepting those which relate to the matter of the motor power.

It should not be overlooked that the paramount consideration implied above; that the purposes of a street railway in both cases are identical, and subserve throughout without diminution the same public needs or demands, and no more, and that the discharge of these functions is the prime moving cause which has elicited the legislative sanction to this mode of conveyance in the streets of cities. There is no charge in this case of any negligence, either in the construction or operation of the defendant company's railway, nor is there any averment that there is any actual and special obstruction or physical impediment to the ingress to or egress from the plaintiff's premises arising from the construction of the railway; and so on none of those grounds can damages or any other relief be predicated. The powers of the Legislature, and of any subordinate political agency, in authorizing the occupancy or use of streets and highways, are not unconditional. Cities in Indiana are expressly empowered by section 12 (section 415 of R. S., 1881) of the act entitled "An act to provide for the incorporation of street railroad companies," approved June 4, 1861, to authorize the construction and operation of a street or horse railway in the streets, and such a license is a *sine qua non* to the lawful exercise of the right by the company. A street or horse car railway may extend its tracks and operate its road over any highway beyond the city limits, after having secured the permission of the proper board of county commissioners, (section 1, act March 9, 1879, p. 179, and section 4155, acts of 1881). If the permits granted to the defend-

ant company are within the limits of the power of the city and board, the company is acting in pursuance of a rightful authority, and the operation of its road is not *per se* a nuisance. The Legislature stands for the entire public, and has complete and paramount authority over all public ways, whether within or without the boundaries of cities or towns, and may authorize acts upon them that would otherwise be deemed nuisances. In virtue of this authority, the occupancy of streets by water, telephone, telegraph and gas companies for their respective purposes are made lawful. These powers of the sovereign authority may be delegated to such subordinate municipal agencies as the Legislature shall consider promotive of the public interests, and this whether the fee in the streets or highways is vested in the adjoining abuttor or is lodged in some public body. While the effect of such authorization is to convert an otherwise wrongful transaction into a legitimate one, it will only protect the donee of the license so long as the acts done under it are within the scope of the grant and in the reasonable exercise of care. The power of the Legislature is limited by constitutional restrictions which inhibit it from the taking of private property for any purpose without precedent unless compensation is made. It has been held over and over again that it is constitutionally competent for the Legislature to sanction the appropriation or use of a street for an ordinary horse railroad, and that such appropriation is not a taking of private property within the meaning of the Constitution. On the grounds that such a use falls entirely within the original purpose for which streets are laid out or dedicated, the basis of this assumption or conclusion is found in the inference that such street railway responds to the convenience of the local traveling public, and the exigencies demanded by modern business methods, and that all these uses are but an extension in a degree of the primary functions of the streets and are not a different use, and the result is that there is no additional or disparate burden imposed by the laying and operation of an ordinary street railroad on a street. The legal conse-

quences flowing from this conclusion are pregnant with important interests to adjoining abutments as well as persons more remotely located in respect to any depreciation in value of the property or the consequential impairment of their business. The doctrine summed up is that in such a case there is no violation of any private rights of the adjoining proprietor, either in his lot or any business that may be conducted on it, because such a use of the street is not contrary to the constitutional prescription that "no man's property shall be taken by law without just compensation."

However correctly courts have settled the rules governing the relative rights of private individuals and the public, in streets and abutting property, it is insisted that the case at bar is not covered by these principles, because the operation of the defendant company's railroad is effected by an electrical motor, which is not within the terms or meaning of the legislative grant of powers to the railway or to any city authorizing it to license. To make good this position of the plaintiff, it is claimed that the use of such a motor renders the operation of such a street railway extraordinary and inconsistent with common public use of the street, and that if this is so, there is competent evidence that additional burden has been imposed on plaintiff's property not within the public easement, and the rule noticed above and arising in the case of the heretofore common way of moving such cars by animal power is inapplicable. So then in the different action of the two motor powers must inhere any legal consideration in this case, that can withdraw an electrically operated road, although authorized by law, from the effect of the accepted doctrine arising in the case of an ordinary horse railroad. Does, then, the electric motor show that the use of the street is extraordinary and inconsistent with the public easement? The use of the street has been, as public needs have required, subdivided, and particular portions of public use have been restricted to certain defined limits in the street, as the sidewalks are devoted to foot passengers and the interme-

diate spaces to animals, vehicles and other uses. The greater and more complex the uses become the inconvenience to former uses becomes greater and more defined. It is not then every inconvenience, impairment or curtailment of the customary accommodations or enjoyments of the general public or the abutter, that will suffice to constitute a legally appreciable deprivation of a right of either. To determine whether a use of a street is without the original public easement it is quite plain that the inconvenience complained of must be tantamount to a substantial impairment of the public use—in other words, that the use of the street is destroyed or converted into a new use subversive of its original purpose. If the general public use and operation of the new motor are substantially consistent, they are homogeneous, and the locomotion of the cars by electricity or animal power is a mere matter of fact, and imports no substantial significance, because no new burden is imposed and no private property is taken in contemplation of law. The averments in the complaint relevant to this part of the matter are in fact not about the motor itself, but are rather about its manifestations, or the phenomena that follow from its operation. These manifestations are covered by the following allegations: that by reason of the propulsion of the cars by electric power they are driven much more rapidly than by animal power; in passing over the street, they make a loud, churning and pulsating noise, accompanied by a peculiar humming sound, and with the electric wire under the rail, produce constant flashes of electric light especially at night and in damp weather, and are without visible means of locomotion. It is then alleged that these several facts cause fright to horses not long accustomed to these sights and sounds when approaching or being approached by the cars, and they become uncontrollable and run away, and thereby frequent accidents occur. That the fright to such horses and the dangers incident to it have created apprehensions of danger upon the street, and it has become widespread in the community, and has the effect of driving trade and business

from the street. The sum of the averments is that some horses, not long accustomed to the movement of the cars by the electric motor, become frightened, and frequently run away. Does, then, the fact that some horses not long accustomed to the alleged manifestations show that there is a use of the street that is substantially inconsistent with the general public use of it? It is admitted, by implication at least, that horses will become accustomed to these sights and noises, and are tractable as usual. It comes to this: that some horses at first become so frightened until they are broken or familiarized with these sights and noises. It is plain that this inconvenience is temporary and not permanent or insuperable, nor does it extend to the general public who are driving horses in the street, but is limited to those only who are using such animals. It is a fact, and within the common knowledge of all who have observed the operation of these cars in the presence of horses, that the difficulties in their management are overcome in a comparatively short time, except in a few cases, and the streets are and can be used by the entire public passing over the street, in reasonable safety, and without any substantial impairment of the known legal rights of any one. Effects not unlike these complained of are witnessed, and have been, since streets have been used for the movement of processions, parades, shows, passage of machinery, or vehicles creating unusual sounds or noises, or strange appearing sights, and it has never been considered that such a use was evidence of an additional burden or recognized as furnishing any legal basis for actionable wrongs where proper care was observed. It has been held that a change of motor can not be deemed a change in the use of the street. I do not think the averments raise the legal conclusion that there is such a substantial and permanent impairment of the use of the street by the general public, that it can be inferred that an additional burden has been imposed; and if the defendant company has been authorized by law to use the motor complained of, the depreciation in the

value of the plaintiff's property and business is not recognized by the law.

The plaintiff next maintains that the statute does not grant to the defendant company the right to use the electric motors to propel cars over the land in front of his lot, and that entitles to relief. The statute authorizing the chartering of street railways and prescribing their powers and duties provides that a corporation may be formed by not less than five subscribers to the stock of any contemplated "street or horse railroad company" for the purpose of constructing street or horse railroads upon and through the streets of the cities and towns in this State (section 4143, R. S., 1881 ; section 1, act 1861, p. 75). The title of the act reads in these words: "An act to provide for the incorporation of street railroad companies." The plaintiff insists, and correctly, too, I think, that this act should be interpreted in the light of the circumstance and knowledge existing in 1861, when the act was passed in reference to the operation or locomotion of street cars. It is claimed that since street cars were then only propelled by animal power, it is reasonable to assume that the Legislature intended to enable companies organized under it to construct and maintain a horse railroad, and to exclude the use of any other motor. The paramount purpose of the Legislature in enacting the statute authorizing the use of a new and improved mode of travel in cities was the public convenience. Especially regulations are imposed in reference to gradient and location, but nothing is directly said about the motor. The motor was not a controlling or noticed matter in the immediate purpose of the act. If the prime object was the accommodation of the local public, by the use of this sort of conveyance, how can it be reasonably asserted that this accommodation of the same public by the same way should be restricted to the use of an instrumentality which is only a subordinate means to the ultimate end in view, the accommodation or convenience of the public? If it is correct to say that public utility and convenience are the underlying considerations for establish-

ing authority for the operation of street cars, it would seem that the propelling power should fall within the same consideration as the principal thing; in other words, that public utility or convenience should operate throughout, and when it required it that the motor should be modified, or superseded, when not inconsistent with the enjoyment of the public easement in the street by the general public, and in the absence of any declaration of a contrary intent, it would seem rational to infer that such was the intent of the Legislature. The act was passed at a time when it was a matter of common knowledge that mechanical devices were being daily discovered, and were practically applied in almost every department of public and private economies. The Legislature was cognizant that science and skill were occupying wider and deeper fields of thought and activities, and new discoveries were used wherever and whenever time, money, health and the convenience of the people required them. It would seem, in such a case, to be an inversion of the true intent and understanding of the Legislature, to say that all the useful invented appliances of the future should be excluded from public enjoyment, and that the horse or other animal should alone be utilized to propel street cars. The statutes speak of a street railroad in the enacting clause, and in the body of the acts, as street or horse railroads, and this language is sufficiently broad to cover a street railroad, whether the cars are drawn by a horse or propelled by the power of an electric dynamo, and the defendant company is in the legitimate exercise of its charter power in using the same. In the view I have taken of the pending question, it is not necessary to examine other questions submitted. The demurrer to the complaint is sustained.

NOTE.—See note to *Detroit City Ry. Co. v. Mills*, post.

GEORGE HALSEY v. THE RAPID TRANSIT STREET RAILWAY COMPANY.*Court of Chancery of New Jersey, October, 1890.*

(47 N. J. Eq. 880.)

ELECTRIC RAILWAY.—POLES IN STREETS.—ABUTTING OWNERS.

Even where the abutting owner's title extends to the center of the street, his fee is subject to the public easement for purposes of travel.

It is consistent with such purposes that the public authorities should adapt them, in their use, to the improvements and convenience of the age; among which is the electric railway with its equipments; and poles and wires are necessary equipments.

It follows that the erection of poles in a street for electric railway purposes imposes no additional burden, for which the abutting owner is entitled to compensation.

The question whether or not a new method of using a street for public travel results in the imposition of an additional burden on the land must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use.

The slight obstruction of a street caused by poles for electric wires does the abutting owner no irreparable injury, different from that suffered by the public at large, so as to entitle him to equitable relief.

The maintenance of lamps for street lighting upon the poles of an electric railway being required by the municipality as a condition of permitting their erection, would, it seems, legalize their erection.

Cases of this series cited in opinion: *Taggart v. Newport Street Railway Co.*, *post*; *Williams v. City Electric Street Railway Co.*, vol. 3, p. 281; *Pierce v. Drew*, vol. 1, p. 571.

On application for an injunction, heard on bill and affidavits and answer and affidavits.

John R. Emery and Frederic W. Stevens, for the complainant.

Chandler W. Riker and Theodore Runyon, for the defendant.

VAN FLEET, V. C.: The complainant owns lands abutting on Kinney street and Belmont avenue, in the city of Newark. His lands have a frontage on Kinney street of two hundred and thirty-six feet and on Belmont avenue of about one hundred and thirty-three feet. His title extends to the middle of the street. The defendant is a street railway corporation. It was organized under a general statute approved April 6th, 1886, entitled "An act to provide for the incorporation of street railway companies and to regulate the same." Rev. Sup. p. 363. The defendant has laid two railroad tracks in Kinney street, and intends to lay two others in Belmont avenue. One of those laid in Kinney street is on that part of the street in which the complainant owns the fee of the land. No claim is made that these tracks were put down without authority of law, or in violation of the complainant's rights. They are unquestionably lawful structures. They were put down by permission of the city authorities and under their supervision. The defendant intends to use electricity as the propelling power of its cars, and for the purpose of applying this force to the motors on its cars, it has, with the permission of the city authorities, erected three iron poles in the center of Kinney street and strung wires thereon. The poles stand partly on the complainant's land. The erection of these poles and the use to which the defendant intends to apply them constitutes the only ground on which the complainant rests his right to the relief he asks. The bill describes these three poles as standing one hundred and eleven feet distant from each other, about twenty feet in height, ten inches by six in diameter at the base, set in a guard or frame, in the form of an inverted cup, which at its base is twenty-two inches by eighteen in diameter. To what depth below the surface the poles have been sunk, or what are the dimensions of the part extending below the surface, or whether they have been put in the earth at all or simply set up on the surface, are matters in respect to which neither the bill nor the answer gives any information whatever. Both pleadings, however,

agree that the poles stand in the center of the street, so that it is an undisputed fact in the case that the whole extent of the land of the complainant occupied by either the poles or the guards, are three spaces of nine inches by eleven, and that the spaces so occupied are in that part of the street where the right of the public is, for purposes of travel, paramount as against the complainant. The poles were erected without the consent of the complainant and without compensation to him. No compensation is intended to be made. The complainant insists that the erection of the poles imposed a new and additional servitude on his land in the street; in other words, that his land, by the erection of the poles, has been appropriated to a purpose for which the public have no right to use it. If his insistent is true it is obvious that his constitutional rights have been violated, for one of the most important guaranties of the constitution is, that private property shall not be taken for public use without just compensation. It is likewise obvious that if the complainant's constitutional rights have been invaded by the erection of the poles, he is entitled to protection by injunction, for that is the only remedy which will adequately redress his wrong. It is the only judicial means by which that which has been taken from a citizen in violation of the rights secured to him by the constitution can be effectually restored to him. The complainant asks that the defendant may be enjoined from erecting poles on his land in Belmont avenue and also from making any use of those erected on his land in Kinney street.

The question on which the decision of the case must turn is this: Has the complainant's land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first importance in discussing this question to keep constantly before the mind the fact that the *locus in quo* is a public highway, where the public right of free passage, common to all the people, is the primary and superior right. The complainant has a right in the same land; he holds the fee subject to the public easement. But his right is subordinate to that of the public and so insignifi-

cant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest. Mr. Justice DEPUE, in pronouncing the judgment of the Court of Errors and Appeals in *Hoboken Land and Improvement Co. v. Hoboken*, 7 Vr. 540, 581, said: "With respect to lands over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest." This view was subsequently enforced by the same court in *Sullivan v. North Hudson R. R. Co.*, 22 Vr. 518, 543. Both the nature and extent of the public right are well defined. Lands taken for streets are taken for all time, and if taken upon compensation, compensation is made to the owner once for all. His compensation is awarded on the basis that he is to be deprived perpetually of his land. The lands are acquired for the purpose of providing a means of free passage, common to all the people, and consequently may be rightfully used in any way that will subserve that purpose. By the taking, the public acquire a right of free passage over every part of the land, not only by the means in use when the lands were taken, but by such other means as the improvements of the age, and new wants, arising out of an increase of population or an enlargement of business, may render necessary. It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age. *Morris and Essex R. R. Co. v. Newark*, 2 Stock. 352, 357. This is the principle on which it has been held that a street railway, operated by animal power, does not impose a new servitude on the land in the street, but is, on the contrary, a legitimate exercise of the right of public passage. Such use, though it may be a new and improved use, still is just such a use as comes precisely within the purposes for which the public acquired the land. Chancellor WILLIAMSON, speaking on this subject in the case last cited, said in substance (p. 558), the authority to

use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a taking of private property from the owner of the fee of the adjacent land as is prohibited by the Constitution. The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is appropriated, and no right of the owner is interfered with. While the street is preserved as a common public highway, the use of it does not belong to the owner of the land abutting on it any more than it does to any other individual of the community. The Legislature, therefore, does not, by permitting a railroad company to use the highway in common with the public, take away from the land owner anything that belongs to him. It is not a misappropriation of the way. It is used, in addition to the ordinary mode, in an improved mode for the people to pass and repass. This exposition of the law, so far as it concerns horse railroads, has been approved as correct in all subsequent cases. As I understand the adjudications of this State, this principle must be considered authoritatively established, that any use of a street which is limited to an exercise of the right of public passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not tend, in any substantial respect, to destroy the street as a means of free passage, common to all the people, is perfectly legitimate. Such use invades no right of the abutting owners; it takes nothing from them which the law reserved to the original proprietor when his land was taken; it is simply a user of a right already fully vested in the public, and consequently, by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation.

It is not denied that the railway tracks which the defendant has laid on the complainant's land were placed there by authority of law, nor that the defendant has a legal right to use them in the transportation of passengers, but the

complainant's claim is this: that by the erection of the three poles, his land in the street has been appropriated to a use entirely outside of the public easement, and that it follows, as a necessary legal consequence, that such use constitutes a wrongful taking of his property. Stated more briefly, his claim is, that the erection of the poles puts an additional servitude on his land, and attempts to give the public a right in his land which, as yet, has not been acquired nor paid for. That the poles will, to a trifling extent, obstruct public travel and prevent infinitesimal parts of the street from being used as a means of free passage, is a fact which cannot be denied, but there is nothing in this situation of affairs which entitles the complainant to the aid of a court of equity, unless it is made to appear that the nuisance thus created results in some substantial injury to him, different from that suffered by the public at large, and that the damage which he will sustain in consequence of the nuisance is irreparable in its character. The rule on this subject is settled. An individual has no right of action, in cases of nuisance created by obstructing a highway, unless he suffers some private, direct and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of the property of the party complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *Morris and Essex R. R. Co. v. Prudden*, 5 C. E. Gr. 530, 537. No irreparable damage is shown in this case; indeed, I think it may be well doubted whether a sufficient injury is shown to entitle the complainant to maintain a personal action in any court. The bill avers the following facts: that the complainant's premises are used as a japannery, with a present entrance to them from Kinneystreet; that one of the poles in Kinney street stands about forty-five feet distant from the point of entrance, and that the pole, by reason of the slope of the street, makes the passage of wagons to the entrance more inconvenient than it would be if the pole was not there. Now, I am compelled to confess to an utter want of capacity

to see how a pole, with a base of twenty-two inches by eighteen, standing in the middle of a street sixty feet wide, and distant forty-five feet from the point of entrance, can, to any appreciable extent, obstruct or impede the passage of a wagon over the street to the entrance, no matter what the slope of the street may be. It is true there is a very small space in the middle of the street over which a wagon approaching the entrance cannot pass, but it may pass on either side. Besides, the distance of the pole from the entrance renders it very improbable, as it seems to me, that a wagon, in passing from the street to the entrance, would, if there was no pole there, pass over this space one time in fifty. Certain it is, that even if it be true that the pole diminishes the complainant's means of access to the entrance, the diminution is so insignificant as to lay no ground for relief in equity.

A doubt as to whether the complainant's land in the street has been appropriated to a purpose for which the public have no right to use, will, at this stage of the cause, be fatal to his claim to an injunction. In a case where the complainant's right is doubtful and no irreparable damage will result from the doing of the act which he seeks to have enjoined, a preliminary injunction should not be granted. *Hinchman v. Paterson Horse R. R. Co.*, 2 C. E. Gr. 75, 81. The rule on this subject has recently been stated by the Court of Errors and Appeals, in a form so lucid and imperative as to remove all doubt respecting the judgment which this court must pronounce on applications of the class just described. This is the form in which the rule is laid down: "It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's rights, which he seeks to have protected *in limine* by an interlocutory injunction, is in doubt, or where the injury which may result from the invasion of that right is not irreparable." *Hagerty v. Lee*, 18 Stew. Eq. 255, 256. The poles have been placed on that part of complainant's land where, if their erection constitutes a legal

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injury at all, they will do the least possible harm. They have been placed on the edge of his boundary line, at a point where, so long as his land remains subject to the public easement, it is not possible for him to make any use whatever of the land. Had they been placed on the sidewalk in front of his premises, rights, growing out of a duty incumbent upon the abutting owner in respect to that part of the street, might have made it the duty of the court to consider questions not at all involved in this case. "A sidewalk," said Chief Justice BEASLEY, in *Agens v. Newark*, 8 Vr. 415, 423, "has always, in the law and usages of this State, been regarded as an appendage to, and a part of, the premises to which it is attached, and is so essential to the beneficial use of such premises, that its improvement may well be regarded as a burthen belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground, I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable." And Mr. Justice DIXON, in pronouncing the opinion of the Supreme Court in *Weller v. McCormick*, 18 Vr. 397, 400, said: "Probably in consideration of the peculiar privilege usually accorded to the owner to use the adjacent sidewalk for stoops, areas, chutes and other domestic and trade conveniences, he has been held chargeable with the whole expense of maintaining this portion of the road." These utterances show that there is a material distinction between the rights of an abutting owner in the sidewalk adjacent to his premises and those which he may exercise over the other part of the street. I entertain no doubt that that part of the street which has been set apart for public use by means of vehicles may be lawfully applied to uses which would be unlawful, as against the adjacent owner, if exercised, against his will, on the sidewalk which his money has paid for.

The question here, however, is, what are the rights of an adjacent owner in that part of the street in which he holds

the naked fee, but which has been set apart, by municipal regulation, for public use by means of vehicles. Mr. Justice HAINES, in speaking of his rights in an ordinary highway, not an urban way, said, in *Starr v. Camden and Atlantic R. R. Co.*, 4 Zab. 592, 597:

"He may lay water pipes, gas or other pipes below the surface; may excavate for a vault, or dig for mining purposes, and use the soil in any other manner that does not interrupt the free passage over it." In a recent case, heard by the chief justice and Justices DIXON and REED, Mr. Justice DIXON, in pronouncing the opinion of the court, said, in substance, that an abutter may use the highway in front of his premises, when not restrained by positive enactment, for loading and unloading goods, for vaults and chutes, for awnings, shade trees, &c., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel. The public right is paramount, and includes the right to have the street safe for travel. That of the abutting owner is subordinate.

Weller v. McCormick, 23 Vr. 470. Some of the rights mentioned in these definitions cannot, as is obvious, be exercised in that part of the street where the poles stand. An awning could not lawfully be put there, nor a chute, nor shade trees. Nor could the privilege of loading and unloading goods be exercised at that point either rightfully or advantageously. As to the other rights mentioned, namely, to lay pipes, to construct a vault and to mine, there is not, as the case now stands, a word of proof before the court going to show that the poles do or will impair these rights in the slightest degree, or prevent the complainant from exercising them to the fullest extent.

The court might very properly, I think, at this point, deny the complainant's application, on the ground that he has shown no such injury as entitles him to relief by injunction, but as this course would leave the principal question of the case undecided, it should not, in my judgment, be adopted. The litigants, I think, are entitled to a decision on the question, whether or not the complainant's land in

the street has been appropriated, by the erection of the poles, to a use not within the public easement. That is the question which received the principal attention of counsel on the argument, and which has occupied the greater part of the time devoted to the consideration of the case.

The right of the defendant to use electricity as its motive power is clear. The defendant was organized under a general statute, authorizing seven or more persons to associate themselves together, by articles in writing, for the purpose of forming a corporation to construct, maintain and operate a street railway for the transportation of passengers. Rev. Sup. p. 363. The motive power to be used by corporations formed under this statute is in no way limited or defined; the statute does not say that they shall use animal, mechanical or chemical power; it says nothing at all on the subject of power; hence, under the general grant of power to maintain and operate a street railway, it would seem to be clear, that a corporation formed under this statute, takes, by necessary and unavoidable implication, a right to use any force, in the propulsion of its cars, that may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street, according to other customary methods, from having the free and safe use thereof. While the rule is elementary that public grants are to be strictly construed, still it is also well established that where a corporation is authorized, by a general grant, to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take, by implication, all such powers as are reasonably necessary to enable it to accomplish the purposes of its creation. I am, therefore, of opinion that if there was no other legislation on this subject than that just mentioned, and that it was made to appear that electricity could be used for the propulsion of street cars without preventing the free and safe use of the street by other means of transportation, the defendant would, by force of the statute under which

it was organized, have a right to use electricity as its motive power. But there is other legislation on this subject. Just a month prior to the approval of the statute under which the defendant was organized, another statute was passed, which declares that any street railway company in this State may use electric motors as the propelling power of its cars instead of horses; provided, it shall first obtain the consent of the proper municipal authority to use such motors. Rev. Sup. p. 369, sec. 30. On the argument it was contended that the Legislature meant to confine the grant made by this statute to such corporations as were in existence when the statute was passed and to exclude such as should subsequently be created. This view was not pressed with much vigor, nor without the expression of doubt. I cannot adopt it. On the contrary, it seems to me, that when the two statutes are considered together, as they must be, for each forms a part of the same legislative scheme and both were enacted at the same session, it is made perfectly plain that the Legislature meant that corporations formed under the later statute should have the benefit of the grant made by the earlier. The grant, it will be observed, is not limited to such street railroad companies as were in existence when the statute was passed, or as had theretofore been created, but is made to any street railroad company in this State. The grant is general, and was obviously designed to operate in favor of all corporations of the kind described, whether existing at its date or subsequently created. This construction puts the legislation under consideration in harmony with that provision of the constitution which prohibits the granting of any exclusive privilege to a corporation and commands that corporate powers, of every nature, shall be conferred by general laws.

By the terms of the statute just construed, no street railway corporation can use electricity as its motive power until it has obtained the consent of the proper municipal authority. The defendant has such consent. It was given by resolution adopted by the common council and approved

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by the mayor. The complainant contends that consent cannot be given by resolution, and insists that the municipality, in such a matter, can only act by ordinance. But the rule, according to the adjudged cases, is firmly settled the other way, and may be stated as follows: Where a statute commits the decision of a matter to the common council or other legislative body of a city, and is silent as to the method in which the decision shall be made, it may be made either by resolution or ordinance. Or, to state the rule in another form, where no method is prescribed in which a municipality shall exercise its power, but it is left free to determine the method for itself, it may act either by resolution or ordinance. One method is just as effectual in point of law as the other. *State v. Jersey City*, 3 Dutch. 493; *City of Burlington v. Dennison*, 13 Vr. 165; *Butler v. Passaic*, 15 Vr. 171.

In view of the legislation and the action of the city authorities just discussed, it would seem to be clear that the right of the defendant to use electricity as its motive power, stands, at least so far as the public are concerned, on a sure foundation. The poles and wires are to be used to apply electricity to the motors on the cars. They form a part of what is called the overhead system. In the present state of the art, they constitute a part of the best, if not the only means, by which electricity can be successfully used for street car propulsion. The proof on this point is decisive. Thomas A. Edison is perhaps the highest authority on this subject in this country. He says, in an affidavit annexed to the defendant's answer, that the only method of applying electricity for street car propulsion which, up to the present time, has proved successful, electrically and commercially, is what is known in the art as the overhead system, whereby electricity is supplied to the motors on the cars from wires suspended above the cars. Other electricians say the same thing. The proofs also show that there are over two hundred electric street railways in the United States either in operation or in course of construction, and that of those in operation

nearly all use the overhead system. That, according to the proofs, is the best system, and the one in general use, and the only one which, as yet, has proved successful. The facts just stated are in no way controverted, so as the proofs now stand, the court is bound to declare, as an established fact, that the poles and wires are, in the present state of the electric art, necessary to the successful operation of the defendant's railway by electricity. The poles and wires are to be used as helps to the public in exercising their right of passage over the street. They form part of the means by which a new power, to be used in the place of animal power, is to be supplied for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way and thus add to its utility and convenience. The whole matter may be summed up in a single sentence; the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question that the poles and wires do not impose a new burthen on the land, but must, on the contrary, be regarded, both in law and reason, as legitimate accessories to the use of the land for the very purpose for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the streets by means of street cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate. It would seem, then, to be entirely certain that the occupation of the street by the poles and wires takes nothing from the complainant which the law reserved to the original proprietor when the public easement was acquired. This view is in strict accord with the uniform current of judicial opinion on this subject. The question presented here for judgment has already been considered by the Supreme Court of Rhode Island in *Taggart v. Newport Street Railway Co.*, 19 Atl. Rep. 326, and by the Circuit Court of the United States for the Eastern District of Arkansas in *Williams v. City Electric Street Railway Co.*, 41

Fed. Rep. 556, and by local courts in Kentucky, Ohio and Indiana, and in each instance the decision has been that the placing of the poles and wires in the street, for the purpose of propelling street cars by electricity, did not impose a new servitude on the land, nor appropriate the land to a use not within the public easement. The decision in these cases was placed upon this manifestly just principle that the question, whether a new method of using a street for public travel results in the imposition of an additional burthen on the land or not, must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. The use is the test and not the motive power. And this principle exhibits, in a very clear light, the reason why it has been held that the placing of telegraph and telephone poles in a street imposes an additional servitude on the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone, differs so essentially, in every material respect, from their general and ordinary uses, that the general current of judicial authority has declared that it was not within the public easement. Massachusetts, has, however, by a divided court, held otherwise. *Pierce v. Drew*, 136 Mass. 75.

The authority on which the complainant principally relies to maintain his right to an injunction, is the judgment of the Court of Errors and Appeals in *Wright v. Carter*. That case arose out of the following facts: The Legislature authorized a turnpike company to construct its turnpike on a public highway, but directed that the highway should be vacated before the construction of the turnpike was commenced. The object of this direction was not to discharge the land from the public easement, but to relieve the public

from the duty of keeping the highway in a proper state of repair and to impose that duty on the turnpike company. The highway was vacated and the turnpike constructed. After the turnpike was completed, the company built a house for its gate keeper within the limits of the highway and on land in which the plaintiff held the naked fee. The plaintiff then brought ejectment. His action was based on the notion that the vacation of the highway discharged his land from the public easement, and that after the easement had once been discharged, it was not within the power of the Legislature to reimpose it without making provision that compensation should be made. He also insisted that even if the public easement still endured, a new servitude had been imposed upon his land by the erection of the house. The Supreme Court held both his positions to be unsound and gave judgment for the defendant. *Wright v. Carter*, 3 Dutch. 76. This judgment was carried to the Court of Errors and Appeals and there reversed. No opinion appears to have been written, but the ground of the reversal is given by Chief Justice BEASLEY in *State v. Laverack*, 5 Vr. 201. On page 208 he says: "I have always understood that the view of the Supreme Court, touching the legislative right to convert the public highway into a turnpike, was concurred in by the higher court, and that the point of dissent was with regard to the privilege which had been sanctioned of putting the toll house on the property of the land owner." The chief justice also expresses it as his judgment, that the erection of the house "was an invasion of the property of the land owner, because to this extent it put an additional servitude upon his property. While the land was a public highway such building could not have been erected; consequently, when such land was converted into a turnpike, to authorize such an erection was to give to the public a new use in such land." *Wright v. Carter* and the case under consideration differ, it will be noticed, in every essential feature except that they both relate to a public way. The house could under no possible condition of circumstances be used as an instrument to aid the public in

exercising their right of free passage. It was not erected for any such purpose, but, on the contrary, with the obvious design to withdraw permanently and entirely from public use, as a means of passage, that part of the way which is covered. The poles and wires have been erected for an entirely different purpose; in fact, for a purpose which is the exact opposite of that just stated. They are designed to facilitate the use of the streets as means of public passage and thus increase their utility and convenience to the public.

But I do not believe that it is possible to imagine any condition of facts which would make it lawful to erect a building, to be used as a dwelling, in a public way. Such use of the land would undoubtedly be entirely foreign to the purposes for which it was acquired. There can, however, be no doubt, I think, that erections may be lawfully made in the streets of a city for the purpose of lighting them. They must be lighted at night to make their use safe and convenient and to prevent lawlessness and crime.

By the charter of Newark power is given to its governing body, by express words, to light the streets, parks and other public places. I have no doubt that in virtue of this power the city has the right to erect poles in the street just where the poles in question are. The poles in question are in fact to be used for the purpose of lighting the street. One of the conditions on which the city gave its consent to the erection of the poles is, that the defendant shall place on every other pole a group of five incandescent lights, of sixteen candle power each, and furnish such light every night. This use of the poles and wires would, in my judgment, legalize their erection, but this is not their primary use. They were erected primarily and principally to facilitate the use of the street and add to its convenience as a public way, and it is upon this ground that I think it should be declared that their presence in the street invades no right of the complainant.

The averment that the use of electricity by the defendant, as its propelling power, will render the street so extremely dangerous as practically to destroy it as a public way for

any other use than that which the defendant may make of it, is not supported by the proofs; on the contrary, I think it is very clearly shown, that an electric current of the volume the defendant will use, may be used with entire safety to everybody.

The complainant's application must be denied with costs.

NOTE.—This case is cited in *Detroit City Ry. Co. v. Mills*, *post*.
See note to that case.

FRED H. POTTER V. THE SAGINAW UNION STREET RAILWAY.

Michigan Supreme Court, Nov. 21, 1890.

(83 Mich. 285.)

ELECTRIC RAILWAY.—POLES AND WIRES IN STREETS.—ABUTTING OWNERS
—INJUNCTION.

An abutting owner cannot raise the question of legislative authority of a company to occupy a street for electric railway purposes, irrespective of injury to his own rights. Such question should be raised by the State.

No present injury to an abutting owner being shown, a court of equity will not decree a permanent injunction restraining the maintenance of electric railway appliances in a street.

Nor will such relief be granted where the injury apprehended to the complainant is much less than the loss which an injunction must entail on the defendant, and the latter has a complete remedy at law.

APPEAL from Saginaw county. Appeal by complainant from a decree dismissing his bill to enjoin the construction and maintenance of an electric street railway in front of his vacant lots. Facts stated in opinion.

Hanchett, Stark & Hanchett, for complainant; *D. P. Foote, Marston, Cowles & Jerome*, of counsel.

L. T. Durand, for defendant; *O. F. Wisner*, of counsel.

CHAMPLIN, C. J.: This suit is brought to enjoin the construction of appliances for the use of electricity in operating a street railroad on the street in front of complainant's premises, and to enjoin the use of electricity for the operation of the road.

The bill avers that the complainant's premises front a distance of 240 feet upon Farley street in the city of Saginaw, and 100 feet upon Washington street. The City of Saginaw Street Railroad extends along Washington street, and is operated by horses. The defendant's street railroad has been built, and has been operated by horses, along Farley street, for about two years. Acting under an ordinance adopted by the common council of the city of Saginaw it was engaged, at the time the suit was begun, in putting in place along the street a system of poles and wires constituting what is known as the "overhead system," intending to make use of such appliances in operating its roads by means of electricity. The system consists of poles planted on opposite sides of the street, at intervals of about 125 feet along the street. To such poles, at about 16 feet from the ground, are fastened naked, uninsulated metallic wires, extending across the street from pole to pole, called "cross" or "supporting" wires. Such cross wires are intended to support and maintain in place, suspended therefrom, an uninsulated, naked copper wire, running longitudinally along the street over the track of the railroad, known as "traverse" or "trolley wire," along which the current of electricity passes, and is conducted to the car by means of a follower attached to the top of the car, and which presses against the traverse or trolley wire, receiving therefrom the current of electricity, and, by means of conducting wires carrying the electricity to the device in the car which gives propulsion to the car. The traverse wire has no shield, covering or protection of any kind to prevent other things coming in contact with it, except a longitudinal wire placed at a short distance above it, called a "guard wire." The traverse wire is insulated

only by means of insulators placed upon the short wires connecting the traverse wire with the cross wires.

The complainant charges that the cars to be used are larger and heavier than ordinary horse cars, and are intended to be run at a higher rate of speed; that the force applied to propelling each car will be equal to 15 horse power; and that the cars, by their size, speed, appearance, and manner of propulsion, are calculated to frighten horses.

The entire force of electricity intended to be used for propelling the defendant's many cars continually runs along such traverse wire. Farley street is a street 66 feet wide, paved 30 feet in width, and the defendant's road has a double track for turnout opposite complainant's premises, leaving only seven feet between the track and the curb of the pavement, and leaving scant room between the track and curbing for a horse and carriage to stand. There are many telephone and electric wires already placed along the street, with which the complainant will desire to connect when he shall occupy his premises as a residence. The premises are in a part of the city devoted to residences, and are chiefly valuable for residence purposes, and the complainant purchased the premises for and intends to use them for a residence to be erected thereon.

The complainant charges that if, by any means, the electrical current should pass from the traverse wire to the cross wires, or if any of the telephone or electric light wires should by any means come in contact with the traverse wire, or if a stay wire should come in contact with the traverse wire, danger is incurred of injury to life and property in the immediate vicinity. The insulators used are liable to be broken or impaired, and the wires be displaced, in many ways, as by storms, winds, cold, moisture, and by substances coming in contact therewith, by design or accident, and the passing current of electricity be conducted to the ground by such cross wires, poles, or other conductors which may chance to be at the place. There is danger that the iron rails of the track may become charged with electricity, and, when so charged, are dangerous to persons,

horses and animals coming in contact with them. By the dangers incurred by the employment of electricity by means of such appliances, the premises of the complainant are rendered less desirable for a residence and their value is seriously impaired; and this system for using electricity imposes an additional burden and servitude on the street inconsistent with its proper use as a street.

In July, 1889, the common councils of the city of East Saginaw and of Saginaw City, by ordinances duly enacted, gave the Saginaw Union Street Railway permission to substitute electricity as a motive power. Pursuant to these ordinances defendant at once began the work of putting in the system commonly known as the "overhead wire system." In the city of Saginaw, this work proceeded to the extent of establishing and placing its poles upon either side of the street, and in using those already set under an arrangement made with the owners thereof; the placing of the copper ground wire and attaching it to the rails to provide for the return current back to the dynamos and connecting the poles with the transverse wires, from which to suspend the longitudinal or trolley wire, along which the current was to pass from the power station; and the defendant expended a large sum of money before the filing of the bill of complaint, and before any objection was made by anybody. In East Saginaw the work had been completed upon the Washington street and Genesee avenue lines, and the system was then in successful operation in those streets. Since then, the system has been extended over the defendant's lines of tracks, comprising about 20 miles in both cities, which cities have recently been consolidated, and are now known as "Saginaw City," and these lines are now being operated by electric power.

The complainant has four vacant lots situated at the southeast corner of Washington and Farley streets. Two of them front on Washington street, and two lie in the rear and front on Hamilton street. These are parallel streets, running north and south, and are intersected by Farley street, which runs east and west along side of two of the

lots owned by complainant. Along the side of these lots defendant's road, as originally built and operated, has a switch to enable cars to pass each other, and the track was so built that vehicles could pass between the rails and the curbstone. It has not been changed since it was put down several years ago. Two electric light poles stand on the side of Farley street next to Potter's lots. To these defendant, with the permission of the owner of the poles, attached cross wires running to the opposite side of the street and attached to poles there. These electric light poles are about 175 feet apart. No new or additional poles have been placed by defendant company alongside of complainant's lots. At the time the bill of complaint was filed the defendant had expended in this work, and in the establishment of its electric system elsewhere, upon its lines of track, over \$70,000, and complainant had made no objection to the work done alongside his lots as stated. Complainant's lots are not enclosed by fences, but are open commons. The proofs taken in the case consist mainly of affidavits directed to the mode of construction and the danger in the use of electricity as a motive power for the street railways. The relief asked for by Mr. Potter is that a perpetual injunction be issued restraining the operation of defendant's system by electric power.

Upon the argument, it was contended that this method of operating street railways burdened the highway with a servitude, and was not within the intention of the grantor when he platted the ground and dedicated the streets to the public use. Complainant's counsel also contends that the Legislature has not conferred either upon the city of Saginaw the power to make such a grant to the defendant, or to the defendant to use electricity as a motive power. It is proper that we should eliminate from the case that which is not involved in the issue.

1. The right of the lot owner to be protected against the digging of holes and placing of poles upon the highway adjacent to his lot.
2. The right of the lot owner to be protected against

burdening the street with a new servitude, such as the laying down of rails and running of street cars in front of his premises.

Neither of these is involved in the present issue, and, stripped of all outside questions, the issue is the right of the lot owner to enjoin the use of electricity as a motive power for the propulsion of street cars. In so far as the exercise of such right may rest upon the legislative grant, we observe that the company is exercising such right, and claims it under legislative authority, and, if the corporation is exercising a franchise or right without legislative authority, such exercise should be inquired into by the State. The complainant is not in a position to raise the question irrespective of an injury to his rights as owner of the property injured thereby.

As to the injury to the lots of complainant by use of electricity as a motive power, no present injury is shown. A mere apprehension that injury may result in the future is not enough to warrant the court in perpetually enjoining its use, if no injury can be said to exist which is of that character against which courts of equity should enjoin. Moreover, under the facts of this case, the injury is so remote, and the damages apprehended so disproportionate to the loss which must be entailed upon defendant by a perpetual injunction, that it should not be granted. It is not every case of injury to real estate of a permanent character that equity will enjoin, and the court will look to all the facts and circumstances, and grant or withhold relief as the justice or equity of the case may require. *Hall v. Rood*, 40 Mich. 46; *Buchanan v. Log Running Co.*, 48 id. 364 (12 N. W. Rep. 490); *Big Rapids v. Comstock*, 65 id. 78 (31 N. W. Rep. 811); *Blake v. Cornwell*, id. 467 (32 N. W. Rep. 803); *Miller v. Cornwell*, 71 id. 270 (38 N. W. Rep. 912). In this case the granting of an injunction would cause defendant a great many times more loss than complainant will suffer, if all his apprehensions prove true in the use of electricity to propel cars. Besides, if he has the rights claimed by him, he has a remedy at law for

their violation, and he should, so far as the facts are now developed, be left to that remedy. For these reasons we do not consider that it is necessary to discuss or decide the points raised and elaborately argued by the counsel for the complainant in this case. He has not shown an infringement of an absolute right which calls for the interposition of a court of equity in his behalf.

The decree of the court below must be affirmed, with the costs of both courts.

MORSE, CAHILL and GRANT, JJ., concurred. LONG, J., did not sit.

NOTE.—The case of *Sarah C. Barber v. The Saginaw Union Street Railway* (83 Mich. 299) was argued at the same time and by the same counsel as the foregoing case. The opinion is as follows :

CHAMPLIN, C. J. : The facts in this case differ from those in *Potter v. Street Ry.*, in this: The lot owned by Mrs. Barber is located at the northeasterly corner of Washington and Jefferson streets. The defendant's track is laid along Jefferson street, and, as it approaches Washington street from a westerly direction, it curves to the south, and proceeds along Washington street. The track is laid in the center of the street; and assuming that complainant's rights extend to the center of the streets upon which she adjoins, the defendant's track nowhere comes within 10 feet of complainant's premises, if they extended to the center of the street. Defendant's trolley wire is over the center of the track, and curves with it. When the bill was filed, a sustaining wire extended from the trolley wire at the curve, and was attached to a pole standing between the sidewalk and the paved portion of the street in front of her lot. This pole was stayed with a wire running from the pole to a guy post set in the ground in front of her lot. Defendant, in its answer, made an offer to remove each of them, and to maintain no poles upon or over her lot afterwards, without her consent. The court below, by reason of this offer, directed compliance with it, and the poles and wires were accordingly removed. It appears from the testimony of Dr. Barber, the complainant's husband, that since such removal the complainant has no cause for complaint.

Upon the hearing in the court below, the following decree was entered, viz. :

"It appearing to the court that, since the order was made in this cause for the issue of the preliminary writ of injunction, the post, pole, metallic rope, and wire described in the bill of complaint in said cause, erected by the defendant for operating its cars and street railroad by means of electricity, in front of the complainant's premises, described as 'lot 1, in block 28, north of Cass street, in the city of Saginaw,' in said bill of complaint, have been removed, as directed in said order: It is ordered,

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adjudged, and decreed that the said defendant be, and it is hereby perpetually enjoined and restrained from at any time hereafter erecting, within the street limits on and in front of the complainant's said premises on Washington street, in said city, any poles, posts or wires for operating its cars or railroad by means of electricity, without the complainant's consent therefor first obtained.

"It is further ordered, adjudged, and decreed that the complainant recover of the defendant her costs of this suit to be taxed as heretofore ordered; that the defendant pay such costs to the complainant; and that she have execution therefor out of and under the seal of said court.

This decree afforded the complainant all the relief she was entitled to, and the decree appealed from by her is affirmed, with the costs of this court against the complainant."

MORSE, CAHILL and GRANT, JJ., concurred. LONG, J., did not sit.

This case is cited in *Detroit City Railway v. Mills*, post.

See note to that case.

PHILIP S. TAGGART ET AL. V. THE NEWPORT STREET RAILWAY COMPANY.

Rhode Island Supreme Court, Jan. 18, 1890.

(16 R. I. 668.)

ELECTRIC RAILWAYS.—MUNICIPAL CONTROL.—RIGHTS OF ABUTTING OWNERS.

The erection and maintenance of an electric street railway line, with the poles and wires necessary to the overhead trolley system, does not impose a new servitude, for which abutting owners are entitled to compensation.

A statute conferred power upon a municipal corporation to permit the use of "steam, horse or other power" by an electric railway company. It had been decided that the use of steam could not be thus permitted, since it would impose a new servitude. Held, nevertheless, that the use of electricity could be permitted, under the language "other power."

The right to permit the use of electricity as a motive power for a street railway carries with it the right to permit the erection of the necessary poles in the sidewalks, and this is not repugnant to a provision of the act of incorporation which forbids the company to "incumber any portion of the streets or highways not occupied by" its tracks.

Other provisions of the act of incorporation of electric street railway company, considered and applied.

Case of this series cited in opinion: *W. U. Tel. Co. v. Rich*, vol. 1, p. 271.

Julien T. Davies, Arnold Green and Patrick J. Galvin,
for complainants.

Francis B. Peckham and Darius Baker, for respondent.

DURFEE, C. J.: This bill is brought by the complainants as abutters on certain streets in the city of Newport, along and over which the tracks or rails of the defendant company's street railway have been laid. The object is to have the company enjoined from erecting or maintaining certain poles and wires in the streets in front of their estates. Said poles were erected to support said wires over said tracks for the conduction of electricity, which is used as a motor for the passenger cars traversing said tracks. The poles are placed along the margins of the sidewalks of said street, about one hundred and twenty feet apart, and were placed so by permission of the city council of the city of Newport, given by ordinance. The case was submitted on bill and answer, no replication having been filed. The bill alleges several grounds of relief. We will consider them severally, as alleged.

The *first* ground is that the company did not give notice as required by section 2 of the act of incorporation. Said section provides for notice to abutters, to be given by publication and posting, at least fourteen days before the location of tracks proposed to be laid. The bill alleges that the purpose for which the notice was required was to appraise the abutters "of the nature and extent of the proposed use of the streets and highways," and to afford them an opportunity to appear before the city and town councils having power over the matter, and be heard in relation thereto. The bill admits that a notice was given in August and September, A. D. 1888, but avers that it was defective, in that it did not set forth that any other than horse power was intended to be used. The answer states that said notice did not refer to the matter of power, and maintains that any reference to it therein was unnecessary, since section 2 prescribes notice only before action in

regard to the location of the tracks. This is so. It is section 5 that relates to the power. That section provides that "said tracks or road shall be operated and used by said corporation with steam, horse, or other power, as the councils of said city and towns may from time to time direct." No notice is required before such direction. The ordinance in regard to location was passed January 24, A. D. 1889. It permitted the use of horse power only. The ordinance permitting the use of electricity was passed March 5, A. D. 1889. It seems to us that the latter ordinance was clearly authorized by section 5, in the words above quoted. The previous location of tracks was not affected thereby.

The *second* ground alleged is that the right to use electricity is not given. The language in regard to the power to be used is that above quoted, namely, that the road shall be operated "with steam, horse, or other power, as the councils of said city and towns may from time to time direct." The complainants contend that the word "steam" must be struck out, because it has been decided that steam cannot be used without compensation to the owners of the fee for the new servitude imposed, and no compensation is provided for, and because, "steam" being struck out, "other power" must be construed to mean other power similar to horse power, *i. e.*, other animal power. We do not find the argument convincing. Allowing that "steam" must be struck out for the reason given, it does not follow, in our opinion, that "other power" must be construed to mean other animal power. Horse power is the only animal power which has ever been used for the traction of street railway cars in our northern cities, and it is the only animal power which could have occurred to the General Assembly as fit to be used. The suggestion that "other power" may mean mules cannot be entertained. The act of incorporation was passed in the winter of 1885, when the idea that electricity might be brought into use as a motor was already familiar; and nothing seems more probable than that the words "other power" were inserted with a

view to its possible employment. We do not think the second ground valid.

The *third* ground is that the erection of the poles on the sidewalks is, in effect, prohibited by the act of incorporation. The seventh section, which relates to the repair of the streets where the tracks are, and to damages for negligence on the part of the company, concludes as follows, to wit: "And said corporation shall not incumber any portion of the streets or highways not occupied by said tracks." The poles are certainly in a portion of the streets not occupied by the tracks; but do they *incumber* that portion, in the meaning of the word as used? To incumber, according to Webster, is "to impede the motion or action of, as with a burden; to weigh down; to obstruct, embarrass or perplex." To incumber, as used in said section 7, doubtless means to obstruct or hinder travel, by putting things in the way of it. The poles are very slightly in the way of travel, being placed as hitching posts, lamp posts, electric light poles, telegraph and telephone poles are placed, near the front margins of the sidewalks. We are not inclined to say, however, that they do not incumber because they are placed as they are, but only that it does not follow that they incumber because they are so placed. Take, for instance, a lamp post, or an electric light pole. It is slightly in the way, and, if it served no useful purpose in regard to the street, might justly be deemed to incumber it. But it supports a lamp or an electric light which illuminates the street at night, and so improves the street for its proper use. It is not, therefore, an incumbrance, in any proper sense of the word. The real question is, as it seems to us, whether the words, "and said corporation shall not incumber any portion of the streets or highways occupied by said tracks," were intended to restrain the city council of the city of Newport from authorizing the use of electricity for a motor, in the manner in which it is used by the company. We have already decided that the council has power, by section 5, to authorize the use of electricity so that the question relates only to the manner of using and is whether

the council has power to authorise the use in said manner. It seems to us that the provision that the tracks or road shall be operated by "steam, horse, or other power, as the councils of said city and towns may from time to time direct," is broad enough to empower said councils, not only to authorize the use of electricity as a motor but also to authorize its use by means of any system of application which it approves as suitable; and it further seems to us that the concluding words of section 7 have their full meaning when applied to the company acting of itself, without extending them to city and town councils acting under section 5 or to the company acting under said section, as authorized by said councils. It appears that said concluding words were copied from charters of street railway companies which were only authorized to use horse power, and in which, of course, they could have had no such application as is here contended for. It also appears from the allegations of the answer that the mode of using electricity which has been adopted is the only mode in which it can be successfully used by the company for the operation of the road. These are things which confirm our views. Our conclusion is, that the power conferred by section 5 is not qualified by the concluding words of section 7, and that the poles complained of, having been erected under section 5 as part of the apparatus for supplying the railway with its motive power, are to be regarded, not as incumbering the streets, but as ministering to their uses, and as increasing the facilities for travel which they afford to the public.

The *fourth* ground alleged is that if the act of incorporation authorizes the use of electricity for the operation of said street railway, and the erection of the poles as ancillary thereto, it is unconstitutional and void because it authorizes the imposition of an additional servitude upon the streets, without providing for any additional compensation to the owners of the fee of said streets. We think it is settled by the greater weight of decision, that a railroad constructed in a street or highway, and operated by steam in the usual manner, imposes new servitude and

entitles the owner of the fee to an additional compensation ; but that a street railway operated by horse power, as such street railways are ordinarily operated, does not impose any new servitude, and does not entitle the owner of the fee to any additional compensation. Mills on Eminent Domain, section 205, and cases cited ; Angell on Highways, section 91d, n. 1, and cases cited ; *Newell v. Minneapolis, L. & M. Railway Co.*, 35 Minn. 112 ; also 25 Amer. Law Register, N. S. 431, and cases cited in the note. The distinction is often stated as a distinction between steam and horse railroads, but properly it depends not on the power that is used but on the effect that is produced. A steam railroad is held to add a new servitude, because, as ordinarily operated, it largely prevents the use of the street in the usual modes. Pierce on Railroads, 234. A steam railroad on a street, operated so as to be compatible with the usual modes of use, has been held not to impose a new servitude. *Newell v. Minneapolis, L. & M. Railway Co.*, *supra* ; *Fulton v. Short Route Railway Transfer Co.*, 85 Ky. 640. It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion. *Briggs v. Lewiston and Auburn Horse R. R. Co.*, 79 Me. 363. A steam railroad, as ordinarily operated, it has been said, dangerously interferes with the usual modes of travel, and is a perpetual embarrassment to them, in greater or less degree, according as its business is greater or less, or as the running of the trains is more or less frequent ; whereas, the ordinary street railway, instead of adding a new servitude to the street, operates in furtherance of its original uses, and, instead of being an embarrassment, relieves the pressure of local business and local travel. *Grand Rapids and Indiana Railroad Co. v. Heisel*, 38 Mich. 62. See also *Attorney-General v. Metropolitan Railroad* 125 Mass. 515 ; *Citizens Coach Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 287 ; *Elliott v. Fairhaven & Westville R. R. Co.*, 32 Conn. 579 ; *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194. The only considerable privilege which the horse car has over other

vehicles is that, being confined to its tracks, other vehicles are obliged to turn aside for it; but this is an incidental matter, insufficient to make the horse railroad a new servitude. *Shea v. Potrero & Bay View R. R. Co.*, 44 Cal. 414.

The street railway here complained of is operated by electricity. It does not appear, however, that it occupies the streets or highways any more exclusively than if it were operated by horse power. The answer avers that "electricity, besides being as safe and as easily managed as horse power for the propulsion of street cars, is more quiet, more cleanly, and more convenient than horses, both for residents on the streets used by said cars, and for the public generally, and also causes much less wear and injury to the streets and highways than is occasioned by street cars of which horses are the motive power." These averments, the case being heard on bill and answer, must be taken as true. We see no reason to doubt their truth. It is urged that electricity is a dangerous force, and that the court will take judicial notice of its dangerousness. The court will take notice that electricity, developed to some high degree of intensity, is exceedingly dangerous, and even fatally so, to men or animals, when brought in contact with them; but the court has no judicial knowledge that, as used by the defendant company, it is dangerous. The answer denies that it is dangerous to either life or property. It is also urged that the cars, moving apparently without external force, alarm and frighten horses. This, so far as it is alleged in the bill, is denied in the answer. We see no reason to suppose that this danger is so great that on account of it the railway should be regarded as an additional servitude. The answer alleges that many street railways, operated by electricity, in the same manner as the defendant's, are in use in different States, and that many more are in process of construction.

Reference has been made to cases which hold that telegraph or telephone poles and wires, erected on streets or highways, constitute an additional servitude, entitling the

owners of the fee to additional compensation; and from these cases it is urged that the railway here complained of is an additional servitude, by reason of the poles and wires which communicate its motive powers. There are cases which hold as stated, and there are cases which hold otherwise. But, assuming that telegraph and telephone poles and wires do add a new servitude, we do not think it follows that the poles and wires erected and used for the service of said street railway, likewise add one. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or, if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets, as such, in that they communicate the power by which the street cars are propelled. It has been held, for reasons which we consider irrefragable, that a telegraph erected by a railroad company within its location, for the purposes of its railroad, to increase the safety and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally acquired. *Western Union Telegraph Co. v. Rich*, 19 Kan. 517.

Our conclusion is, that the complainants are not entitled to the relief prayed for on the grounds alleged, and that the bill be dismissed, with costs.

NOTE.—This case is cited in *Louisville Bagging Mfg. Co. v. Cent. Pass. Ry. Co.*, ante, p. 236; *Halsey v. Rapid Trans. St. Ry. Co.*, ante, p. 283; *Lockhart v. Ry. Traction Co.*, post, p. 314.

See note to *Detroit City Ry. v. Mills*, post.

CHARLES LOCKHART ET AL. V. CRAIG STREET RAILWAY
COMPANY AND DUQUESNE TRACTION COMPANY.

Pennsylvania Supreme Court, Jan. 5, 1891.

(189 Pa. St. 419.)

ELECTRIC RAILWAY.—RIGHTS OF ABUTTING OWNERS.—INJUNCTION.

A preliminary injunction should not be granted at suit of abutting owners to restrain an electric railway company from erecting poles and stringing wires in a city street; the company having both legislative authority to build and operate its railway and municipal permission to erect its poles.

The fact of contemplated disturbance of a new asphalt pavement, paid for by plaintiffs by assessment in the ordinary way, is immaterial.

Both legislative and city authorities have the right to authorize the building of street railways, without compensation to property owners.

Legislative authority to form a company for the purpose of constructing street railways "for public use in the conveyance of passengers by any other power than by locomotive" authorizes the construction of electric railways.

A statute authorizing the construction and maintenance of a street railroad is not unconstitutional because it fails to provide means for paying damages to abutting owners in advance.

Case of this series cited in opinion: *Taggart v. Newport St. Railway Co.*, vol. 3, p. 806.

APPEAL by plaintiffs from order refusing preliminary injunction, at suit of twenty-eight owners of property abutting on a street which had been recently paved with asphalt pavement, at their expense, paid by assessment, to restrain an electric railway company from erecting poles and stringing wires. The grounds of complaint were that both poles and tracks would be a continuous trespass upon the property of plaintiffs and serious obstruction to the passage of the street; and would deprive them of easy and convenient access to the street; also that the running of the cars would deprive them of the quiet they had enjoyed and would make their property less valuable.

Further facts appear in the opinion below, rendered by **Stowe, P. J.**: The questions raised by the bill, answer and affidavits, are all merged in one inquiry, to wit: Have the defendants, or either of them, shown the legal right to construct, operate and maintain a railway on Negley avenue, as proposed by them? This involves the proper interpretation of defendants' charters, the constitutionality of the acts under which they were granted, and the validity of the ordinances of the city of Pittsburgh, granting them the right to build and operate the road in question.

It cannot be doubted, at this day, that the Legislature of Pennsylvania has the power to authorize the incorporation of companies with power to build and operate railways with horses over the streets of cities, with the authority and consent of the authorities of said cities, as provided by section 9, article 17 of the Constitution. And it is too late to say that such use and occupation of the streets impose such an additional burden or servitude thereon, as renders it necessary to provide for compensation therefor to the owners of abutting property. Nor can it be successfully urged that the proper municipal authorities may not at their discretion, repair, improve and change the pavement put down by the city, whenever it may be done without any additional cost or expense to the city or property owners, so far at least as it may be of any usual and ordinary character.

The power over the streets vested in the city authorities seems to be absolute, so far as its exercise is not inconsistent with their ordinary use, and does not take, injure or destroy the property of adjoining owners. Therefore, I do not think the fact that the plaintiffs secured the paving of a street from the city, for which they paid in the ordinary way by assessment, took away any right the city had to repair or change the pavement, or grade of the street, or to exercise over it the same power it has over any other street or alley in the city.

There can be no doubt that, under a proper charter, the city had a right to allow the streets to be used for a street

railway, with horses as a motive power. So far as the street use proper is concerned, there is no substantial difference between the tracks of such a street railway and one operated by electricity. We may then assume that, in the occupation of the street with tracks, intermediate paving, and the appliances in ordinary use for railways operated by horses, there is nothing of which the plaintiff can legally complain. Whatever dust, noise and annoyance is incident they must submit to.

But there is a material and substantial difference between such a road and the one contemplated by defendants as regards its relations to plaintiffs' property. The proposed road not only occupies the middle portion of the street or cartway, but will, as a necessary part of its machinery, have iron posts some eighteen feet high, permanently fixed three or four feet in the ground, along or near the curb of the pavement or sidewalk, upon which will also be placed permanent lines of wire crossing the street, and upon which will also be placed a permanent wire over each track running longitudinally with the street. Do these singly or altogether amount to such a taking of plaintiffs' property as is prohibited by the Constitution without compensation?

The placing of wires over the streets does not appear to be a taking of plaintiffs' property. The streets are dedicated to the public use, and a citizen has certain special rights, as an abutting owner, but I cannot see how a wire run through the air above the streets can be said to be a taking, injury, or a destroying of his property. But another question arises in reference to the posts placed in the ground for the support of the wires by means of which the cars are moved. It has generally been understood in Pennsylvania that the abutting owner has a fee to the middle of the adjoining street, and that the public has only a right of passage over it: *Chambers v. Furry*, 1 Y. 167; *Lewis v. Jones*, 1 Pa. 336. But this must not be taken in its literal sense, especially in towns and cities. What might be considered an invasion of private right, so far as the use of a highway is concerned, in the country, might not be so in

a city. Thus a city, by virtue of its general authority, may build sewers in streets, and the adjoining proprietor is not entitled to have damages assessed as for a new use or servitude: *Fisher v. Harrisburg*, 2 Gr. 291; *Cone v. Hartford*, 28 Conn. 363; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Michener v. Philadelphia*, 118 Pa. 535. In such case, the street is not only used without compensation to the adjoining owner, but he is compelled to pay for the use of the sewer.

So, the right to lay down gas pipes in the street given by the Legislature to municipal authorities, without allowing compensation, has been recognized by the courts, and, while it has not been expressly ruled in Pennsylvania that I know of, Mr. Justice STERRETT, in *Sterling's App.*, 111 Pa. 41, while deciding that a gas line was an additional burden which entitled the owner to damages in the country, said: "As to the streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail." Such has been taken to be the law in cities by common consent. I do not think that any one ever heard of a suit in Pennsylvania to recover damages for injury done merely by running a gas pipe along the street in front of his premises under municipal authority. So with water pipes, awning posts, fire plugs and lamp posts. These all more or less impinge upon the absolute right of an owner of the soil, are not necessary to accommodate public travel, or even consistent with the public right to an unobstructed passage-way. And it may be now taken as settled that the owner's rights as to abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, such as the public may from time to time require.

The use of the streets for sewers, tunneling, public cisterns, gas pipes, water pipes, and other improvements necessary for the comfort and convenience of the citizens of cities and towns, so long as they do not substantially interfere with the use of the streets as such appear to be under

legislative and municipal control. Dillon on Mun. Corp., section 699. The case of *Taggart v. The Newport Railway Co.*, decided this year by the Supreme Court of Rhode Island, is directly in point, and if good law, covers the case in hand. My own impression is that the use of poles, wires and other necessary appliances, such as are proposed to be used by defendants, is not in any respect a greater interference with the ownership of the adjoining property owner on a street, than the use of streets for fire plugs, horse troughs, and lamp posts, which have long and generally been recognized as within the power and control of the city government.

Recognizing the right of the Legislature and city authorities to authorize the building of railways upon the streets of a city, without compensation to property owners, because it is a means of public transportation and accommodation, the necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in its construction or use. The proposed construction here is no more illegal by reason of its effects upon the owners of property, so far as actual interference with their rights to use the streets is concerned, than so many lamp posts, and, if compensation could not be compelled for the ground taken by them, neither should it be for the posts supporting the wires in this case.

Thus far I have assumed that the charters of the defendants gave the right to defendants to exercise their powers to construct, maintain and operate a street railway on Negley avenue. But plaintiffs' counsel lay great stress upon the point that, under the acts of assembly cited, defendants have no right to build and operate a road, because no power is conferred thereby to do so. His argument is that no such power is expressly given by the act of 1889, and cannot be implied. But with this I am unable to concur.

The act of May 14, 1889, is entitled "An act for the corporation and government of street railways in this Commonwealth," and provides "that any number of persons,

not less than five, may form a company for the purpose of constructing, maintaining and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid, * * * with the privilege of occupying so much of any street, used or authorized to be used, under any existing charters, as is hereinafter provided, for public use in the conveyance of passengers by any other power than by locomotive." This, leaving out restricting matter of location, would read: "A company may be formed for the purpose of constructing, etc., a street railway for public use in the conveyance of passengers by any other power than by locomotive." The method of forming such company is then provided for, and when incorporated it was to have the power and privilege of succession, to sue and be sued, make and use a seal, and hold real and personal estate. Section fifteen provides that "no street passenger railway shall be constructed by any company incorporated under this act within the limits of any city * * * without the consent of the local authorities," etc. Section sixteen requires the construction, etc., to be commenced within one year after the consent of the proper local authorities, etc.

It is true that the act does not say the corporation shall have the right to build, maintain and operate a railroad, but it does say that a company may be formed, under the provisions of the act, for that purpose; and, to suppose the Legislature authorized a company to be formed for a specific purpose, and then say that when formed it had no power to carry out the purposes of its creation, because they did not declare in so many words that they should have the power to do the very purpose for which it was created, is a refinement of interpretation I do not think warranted by either reason or authority.

To my mind, the power of the Craig Street Railway Company to construct and maintain a railroad, on compliance with the terms of the act under which it was incorporated, is clear, and that these defendants have shown a legal right to proceed and construct the railway contemplated by

them, unless the failure to provide means by which the plaintiff may have such damages as they may sustain, assessed and paid, or secured in advance, renders the act unconstitutional. Upon this question I am not free from doubt, but the decided inclination of my mind is that the act is not unconstitutional for that reason, because the use of the streets for the purpose of applying motive power in the manner proposed, is not such a new use as in cities should be treated as outside the proper purpose for which streets will be held to have been originally dedicated to the public use. *Taggart v. Newport Railway Co.*, before cited, is exactly in point.

The case presented by plaintiffs is certainly not so clear from doubt that a chancellor should grant an injunction, summarily stopping a great public improvement, before final hearing, more particularly if the position taken by plaintiffs is correct and defendants have no legal right to take possession of the streets as they are about to do. A common law action will compel them to pay all damages arising to plaintiffs, and thereafter equity would probably afford a complete remedy by which the wrong done them could be fully corrected.

The injunction prayed for is refused.

E. Y. Breck, James F. Robb, W. W. Thompson and John McCleave, for appellants.

John M. Kennedy, W. A. Stone, S. A. McClung, Charles H. McKee and D. T. Watson, for appellees.

Per CURIAM: The decree is affirmed and the appeal dismissed, at the costs of the appellants.

Decree affirmed.

NOTE.—This case is cited in *Commonwealth, ex rel. Dist. Atty. v. Westchester*, *post*, as authoritative, and in *Detroit City Ry. Co. v. Mills*, *post* as illustrative of the tendency of the courts to the decision that electric railways create no new servitude.

See note to case last above named.

OGDEN CITY RAILWAY COMPANY v. OGDEN CITY ET AL.

Utah Supreme Court, April 1, 1891.

(26 Pac. R. 288.)

ELECTRIC RAILWAYS.—EMINENT DOMAIN.

Electric railways tend to facilitate travel, and the use of streets by them may be permitted by municipal authorities, subject to the general rights of public travel, to such supervision and control by the authorities as the safety and convenience of the public demand, and to the private rights of abutting owners.

A statute authorizing the right of eminent domain to be exercised in behalf of "steam and horse railroads" held to embrace electric street railways, which were unknown when the statute was enacted.

Demurrer to the complaint in an action brought by a street railway company to enjoin the laying by another company, licensed by ordinance of the municipality, of additional tracks in the same streets already occupied by the plaintiff, and to declare void the ordinance granting permission to the defendants to use the street, upon the grounds (1) that public travel would be impeded, and (2) that the rights of plaintiff as an abutting owner would be infringed, sustained, the relief sought being too broad, since the effect would be to deny the defendant permission to use the streets even under the law of eminent domain.

APPEAL by plaintiff below from judgment of District Court, sustaining demurrer to complaint and refusing injunction.

L. R. Rhodes and *T. J. Hudson*, for appellant.

A. R. Heywood, *H. P. Henderson*, and *Ogden Hiles*, for respondents.

ZANE, C. J.: The complaint filed in the court below in this case, among other things, alleged that on October 7, 1883, the city council of Ogden city adopted an ordinance granting to the plaintiff permission to lay down a double

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tracked street railway on Twenty-fifth street and Washington avenue, and that in June, 1890, the city, upon certain conditions named in the ordinance, gave the defendants permission to construct a double tracked railway on the same streets, to be operated by electricity; that these are the main business streets of the city; that the plaintiff had constructed on them a single track, with turn-outs; that if it were to lay down another, the two would occupy about 20 feet in width; and that, if two additional tracks, as threatened by the defendants, should be laid down, the streets would be so obstructed by the four tracks as to greatly interfere with other modes of travel, and that if poles and wires, as threatened, should be placed in front of the property owned by plaintiff, it would be seriously damaged thereby. The complaint prays that the ordinance granting the permission to defendants to lay down their tracks may be declared null and void so far as it purports to grant to defendants any right to construct their road on the streets, and that they be enjoined from filing the bond exacted as one of the conditions of the permit. A prayer for general relief is also added. To the complaint the defendants interposed a demurrer, which the court below sustained, and also refused an injunction. From the decision of the court the plaintiff has appealed to this court, and assigns it as error.

The points urged by plaintiff upon the argument of this appeal call for a consideration of the authority of the city council to give permission to individuals and corporations to construct railways upon the public streets, and to control their location and operation thereon. The city council of Ogden city, by virtue of its general authority over such streets, was authorized to permit street car companies to construct and operate their roads upon them; but without special authority the council could not permit ordinary railroads, with trains propelled by steam power, to do so. The permission is given to facilitate public travel, and for the benefit and convenience of the public. The permission to such companies cannot confer upon them an exclusive

right. The right so given exists in common with the right of travel on the streets in wagons and by other vehicles, and on horseback and on foot, in all legitimate ways. Such persons or companies, in the observance of all reasonable care and caution, have the right to pass their cars over their tracks as often as the public convenience requires and the demand will justify. The cars have the right of way, and the travel by other means and in other ways must turn out, because it can and the cars cannot. The city authorities have the right to require the tracks to be constructed and kept in repair, that travel by other roads can conveniently and safely use them. It is the right and duty of the city to exercise such reasonable control over the construction, repair, operation and business of street railways as the safety, convenience and good of the public demands. The private rights of the owners and occupants of property abutting on the streets must also be protected, for the law is that such abutters have an easement in the street appurtenant to their property, of which they cannot be deprived without their consent, or without just compensation in pursuance of the law of eminent domain; and the council has the power, and it is its duty, to say that no more than a reasonable portion of the street shall be occupied by street railways, and it has no right to consent that more shall be so used. In his work on Municipal Corporations, Judge Dillon says: "The author regards the appropriation under legislative authority of a reasonable portion of the street for a horse railway, constructed on the gradual surface of the street, and used under municipal regulation in the ordinary mode, to be such a use as falls within the purposes for which the streets are dedicated or acquired under the power of eminent domain. When thus authorized, and so regulated by the public authorities as not to destroy the ordinary and usual street uses, this is a public use within the fair scope of the intention of the proprietor when he dedicated the street, or was paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient

modes of use, which are reasonably consistent with the use of the street by ordinary vehicles and in the usual modes. * * * The limitations being that such use must not deprive the abutter of his property rights and easements in the streets, or destroy the ordinary uses of the streets as a public and common highway open to all." If separate tracks for two or more railroad companies on a street with cars operated on them would increase the hazards, or seriously obstruct travel thereon in other ways, or interfere with the rights of abutters, such individuals or companies should be limited to the common use of the same track or tracks. This could be done by suitable conditions, reservations, or limitations at the time of the grant of the right of way, or, in the absence of them, in pursuance of the law of eminent domain. Section 3841 of the compiled laws of Utah is as follows: "The right of eminent domain may be exercised in behalf of the following public uses: * * * (3) Wharves, * * * steam and horse railroads. * * * Sec. 3843. The private property which may be taken under this chapter includes: (1) All real property belonging to any person. (2) Lands belonging to this territory, or to any county, incorporated city, village, or town, not appropriated to some public use. (3) Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated. * * * (5) All rights of way for any and all purposes mentioned in section 3841, and any and all structures and improvements thereon, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof when necessary; but such uses of crossings, intersections and connections shall be made in manner most compatible with the greatest public benefit and least private injury." Electrical railways were not mentioned in the act, but horse and steam railways were. At that time horse and steam power was used, because

thought to be best. Electricity was not then known as a car motor ; but ingenuity and invention have since subjected it to that use, and it is being substituted largely for the others ; and we have no hesitation in holding that under the statute the right of eminent domain may be exercised, in proper cases, in behalf of electrical roads as well as for steam and horse railways.

While the owner of a railway may have an interest in its property, that interest is not more inviolable and sacred than other interests in property. The private interest is one thing, and the public use is another. The property is taken for the public use, not to transfer the interest that one person has in the property to another person. Such transfer incidentally and necessarily follows in order that the public benefit may be enjoyed. When the tracks of one company on a street are sufficient for the business of two or more companies, they should all be required to use them, and the hazards and inconveniences and obstructions to travel by other modes should be limited to the tracks of the one company. If the interest of each company in the railroad property used in common is sufficient to enable to accommodate the public travel, that is sufficient. It appears from the allegations of the complaint that the plaintiff had laid down but one track on the streets named, and that the defendants had not commenced the construction of theirs. The court below was asked to declare the ordinance giving the defendants the right of way on them void. If it had been so decreed the defendants could not have laid down one track, and it does not appear that one additional track would have materially obstructed travel by other modes, or that it would have interfered with plaintiff's private easements on the streets appurtenant to its abutting property. The effect of the decree asked by the plaintiff would have been to deny the defendants any permission on the street even under the law of eminent domain ; for any rights obtained under that law would not have authorized them to construct their road on the street without the permission of the city

Commonwealth, ex rel. v. Westchester.

council. The allegations of fact are not sufficient to warrant an injunction on the ground that the construction of the defendant's railway would damage the abutting property by materially interfering with the rights appurtenant thereto. Except so far as we have considered this case it is analogous to the case of *Henderson v. Railway Co.*, ante, 286 (decided at the present term).

The judgment of the court below is affirmed.

NOTE.—See note to *Detroit City Ry. v. Mills*, post, p. 333.

COMMONWEALTH, EX REL. DIST.-ATTY. v. WESTCHESTER.

C. P., Chester Co., April 27, 1891.

(9 Pa. Co. Court Rep. 542.)

ELECTRIC RAILWAY POLES.—MANDAMUS.

The building of an electric railway in a street, with the necessary poles and wires, imposes no burden upon the abutting owner not compensated for by the original dedication of the street.

A statute authorizing the maintenance of a street railroad to be operated by any motive power except steam, authorizes the use of electricity, and so the maintenance of the necessary poles and wires, although their erection is not expressly mentioned.

One judicial body cannot interfere by mandamus to direct another body with judicial discretionary powers as to how it shall exercise such discretion, or compel it to revise or modify its decision.

So, where the authorities of a borough, exercising a power duly conferred upon them by statute, have by ordinance permitted the erection of poles for an electric railway, the courts cannot, in absence of fraud or corruption, compel the removal of the poles by mandamus, even though they constitute a nuisance.

Case of this series cited in opinion: *Lockhart v. Craig Street Railway Co.*, vol. 3, p. 314.

RETURN in nature of demurrer to writ of alternative mandamus.

F. C. Hooton, for relator.

Buller & Windle, for defendants.

WADDELL, P. J.: We are asked by certain citizens, in behalf of the general public, to issue a writ of mandamus, requiring the authorities of the borough of Westchester to remove a large number of poles already erected by the Westchester Railway Company upon the sidewalks of High and Market streets in the said borough.

The reasons alleged for the issuing of the writ are that said poles have been erected without authority, and are to sustain, over the middle and along the sides of the streets named, one or more electric wires, which are to be used in connection with the railway for the propulsion of the cars by an electric current; that said wires will be uncovered and will be crossed by numerous telephone and telegraph wires, and, because of the powerful current of electricity necessary to be carried over and along the wires of the railroad company, those telephone and telegraph wires will become dangerous and deadly to persons and property, if any derangement of said wires should occur; that by reason of these wires, the railway tracks are liable at times to be charged with electricity to such an extent as to seriously shock horses and other animals, and that cars propelled by the electric system frighten horses to an unusual extent and will tend to prevent the streets named from being used for travel by horses. The relators further allege that they believe, if these poles were removed, it would take away from the railway company the means by which it could set up and maintain the appliances which make its system dangerous to the public, and would compel the railway to either put its wires under ground or cause it to employ other motive power.

The respondents, in return to the alternative mandamus issued upon these various allegations, answer and say that these poles were erected by the Westchester Railway Company under and by virtue of the authority given them under

the provisions of the act of May 14, 1889, after having obtained the consent of the borough authorities to construct, maintain and operate a railway upon the streets designated; and, further, that if such authority is not given by said act, they have not obeyed the mandate of the writ, because such a writ is not the proper proceeding, under the facts alleged, to compel the removal of the poles, nor is such a writ the proper writ to prevent the danger contemplated from the use of electricity, as is specifically described in the petition of the relators.

The relators thereupon reply to this return and say that the act of assembly referred to, and the ordinance granting the railway company power to erect the poles, are unconstitutional and void, because neither provides that damages shall be paid or secured to be paid to the owners or occupiers of property along the streets named before the taking of their property, or injury done to, or destruction of, the same; and, further, that they can properly proceed by the writ of mandamus to compel the removal of the poles in question; and they, therefore, ask that a peremptory mandamus may issue, commanding the borough authorities to remove the same at once.

It will thus be seen two questions are presented for our consideration; 1st, whether the act of assembly referred to, coupled with the consent of the borough authorities, confers any power to erect the poles, and, if so, whether the act is constitutional? And, 2nd, if the act does confer this power, and is constitutional, then, whether the facts alleged in the petition, and not denied by the return, are sufficient to authorize the court to direct the removal of the poles by mandamus?

We may say, at the outset, that, although a mandamus is a demandable writ of common right, yet it will be granted only in extraordinary cases, where there would otherwise be a failure of justice: *James v. Com'rs*, 13 Pa. 72; *Reading v. Com.*, 11 Pa. 200.

The act of assembly in question provides

That any number of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a street railway on any street or highway upon which no track is laid, * * * for public use, in the conveyance of passengers, by any power other than by locomotive, etc.

And, further, that

No street passenger railway shall be constructed by any company incorporated under this act * * * without the consent of the local authorities, etc.

It is true, the act does not expressly authorize the company to erect poles, nor does it make any provision for paying, or securing to be paid, any damages incurred by reason of the occupancy of the street for railway purposes; the company has the power, however, to build the railroad and convey passengers by any power other than steam. This authorizes, in our opinion, the use of electricity; and, in using electricity by overhead wire, the erection of poles appears to be necessary. They constitute a part of the system adopted by the company for the propulsion of their cars, and, having been erected with the consent of the borough authorities, must be allowed to remain, unless the act of assembly, under which the company and the borough authorities are acting, is unconstitutional, for the reasons stated; or unless some other reason is shown for their removal. *Livingston v. Wolf*, 136 Pa. 533.

As we have said, no provision is made for the payment, or securing the payment, of any damage done to property owners. Such a provision, however, does not appear to be necessary. The street is already dedicated to the public travel, and the building of a railway upon it does not appear to impose any additional servitude on the property of adjoining owners.

What views may have heretofore been entertained by the profession upon this subject are now set at rest by the Supreme Court in their decision in *Lockhart v. Craig Street Railway Co.*, reported in the 21st volume of the Atlantic Reporter. They hold that "the construction of

car tracks in the streets of a city, and the erection of poles along the sides thereof on which wires are suspended across and along the street, are not such a new taking of the street or the imposition of such additional servitude on the property of adjoining owners as will entitle them to compensation," and the decision is not limited to any given number of wires, but is broad enough to include all the appliances necessary to the proper running of the railway. The new use is not such an injury as is to be paid for. This being the case, it was not requisite that the act or the ordinance should provide any means of payment for the alleged injury. We cannot say, therefore, that the omission to do so renders the act or ordinance unconstitutional, and we think the railway company had authority, under the act, to erect the poles after they obtained the consent of the borough authorities to construct their road.

Are the facts alleged in the petition sufficient, then, to authorize us to issue the writ prayed for? This constitutes the second inquiry.

A mandamus is a commandatory writ. It lies where there is a clear legal right in the relator, a corresponding duty in the defendant, and a want of any other adequate, appropriate and specific remedy. It is invoked for the enforcement of duties to the public by officers and others who either neglect or refuse to perform them. He or they who demand it must, in all cases, establish a specific legal right to it, as well as show the duty of the defendants to do what is demanded, and demonstrate the want of any legal remedy. *Com. ex rel. Hamilton v. Councils of Pittsburg*, 34 Pa. 496; *Com. ex rel. Armstrong v. Com'rs of Allegheny Co.*, 37 Pa. 279; *Phoenix Iron Co. v. Com.*, 113 Pa. 570. The relators base their right to have the poles removed upon the allegation that they are to be used for the support of wires, which will, in turn, carry a deadly and destructive current of electricity. Yet this current is to be used to propel the cars of the railway company, as shown by the petition. It will thus be seen that the poles are a part of the appliances to be used by the

railway company in operating their road. In fact, the relators concede that, if they are removed, it will compel the company to make use of some other means to operate their road. It is to be presumed that these matters complained of were all considered when the borough authorities consented to the erection of the poles. As appears by the petition, it was necessary for the railway company to obtain the consent of the borough authorities before they could construct their road upon the streets in question; and it further appears, by the petition, that this consent was obtained on the 30th day of August, 1890. Upon that day the borough council passed an ordinance which, the petition says, among other things, provided that the company should have the right to erect electric wires, poles and other appliances required to operate the railway. We are, therefore, justified in saying the borough authorities must have considered the propriety of erecting these poles for the use and purposes for which they have been erected. It was their duty to do so, and after examining the matter they consented to their erection. In fact, the poles could be erected only after their consent was obtained. It could not have been given without understanding the object in view and considering the propriety of using the streets in the manner contemplated. The power to consent implies the exercise of deliberation and discretion. When the Legislature gave the borough authorities the right to say whether or not a railway company should construct its road upon the streets of the town, it necessarily conferred upon these authorities discretionary powers, and they could only use this discretion by deliberation and the exercise of judgment. They were, therefore, acting in a judicial and not in a ministerial capacity, when they were considering the question; and when they authorized the erection of these poles, it was the result of their deliberative judgment. We are now asked to revise this decision and reverse it by ordering them to remove the poles which they thus consented should be erected. This cannot be done. We have

no such power. We might have compelled them to consider the question, but we could not then have directed their conclusions, nor can we revise them after they have been reached. As long ago as 1812, and frequently since, the Supreme Court of this State has held that "when a person or body is clothed with judicial, deliberative or discretionary powers, and he or it has exercised such powers, according to its discretion, mandamus will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, although in fact the decision may have been wrong, provided such decision was devoid of fraud or corruption." *Griffith v. Cochran*, 5 Birm. 87; *Com. v. Perkins*, 7 Pa. 42; *Com. v. Mitchell*, 82 Pa. 350; *Runkle v. Com.*, 97 Pa. 328; *Dechert v. Com.*, 113 Pa. 241.

The matter is *res adjudicata* and we cannot disturb it. The proper authorities, after full deliberation, have said that the poles should go up, and, in the absence of any allegation of fraud or corruption, we cannot say they must come down. A mandamus is not granted to undo an act already done. The validity of the act done cannot be tried in this way. "It is granted when that has not been done which should be done, but not for the purpose of undoing what has been done." Short on Extraordinary Remedies, 250; *Ex parte Burtis*, 103 U. S. 238. We cannot say, therefore, that there is a clear legal right in the relators to have the poles removed, or a corresponding duty on the part of the defendants to remove them. If it should be alleged that they are an obstruction to public travel and will become dangerous to people and property by reason of the use to be made of them, and, therefore, have become a nuisance since their erection, we would still be unable to order their removal by a writ of mandamus. As we have seen, the relators must be without any other adequate, appropriate and specific remedy before they can invoke this writ. We must remember that the present application is in behalf of the public. The relators do not allege that they received any special injury by reason of the

erection of the poles. Such an obstruction of the sidewalk not being more injurious to them than it is to the citizens at large, an indictment is exclusively the remedy to abate it. *Reading v. Com.*, 11 Pa. 201; *Hoffner v. Com.*, 28 Pa. 114; *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.*, 50 Pa. 100.

Thus we see the relators would have a specific and adequate remedy for the removal of the poles, if they could now be regarded as a nuisance, and the court could not issue the writ here asked for to remedy this condition of things. Believing, therefore, that the borough authorities were authorized to allow the erection of the poles in question, and did consent thereto, and that the act of assembly conferring this power is constitutional; and finding, further, that we have no authority to revise the exercise of this power and that the relators have failed to establish a clear legal right to have the poles complained of removed, we must refuse to issue the writ of mandamus as prayed for.

Writ refused.

NOTE.—See note to next case.

**THE DETROIT CITY RAILWAY V. MERRILL B. MILLS and
JOHN BREITMEYER.**

Michigan Supreme Court, May 8, 1891.

(35 Mich. 684.)

**ELECTRIC RAILWAY.—ABUTTING OWNERS.—INJUNCTION.—CONSTITUTIONAL
LAW.**

In an action by an electric railway company to restrain abutting owners from interfering with the construction of its railway in a certain street, three out of five judges decided in favor of the complainant; one confining himself to the grounds that the complaint was proceeding under

Railway Co. v. Mills and Breitmeyer.

color of legal authority in constructing its road and the defendant had a complete legal remedy; and two finding upon the merits (1) that the Legislature had conferred upon cities of the State the right to authorize street railway companies and use any motive power whatever, including electricity, although that was unknown as a motive power at the time the act was passed, and (2) that the use of a city street for railway purposes imposes no new burden, and therefore compensation to abutting lot owners is not requisite to the power of a city to authorize the construction of railway appliances.

The other two judges held that a new servitude is imposed by the erection and maintenance of electric poles and wires even for purposes of transit, and therefore that abutting owners may properly have the aid of the courts to restrain the erection of such poles and wires until provision is first made for compensation to them.

Cases of this series cited in the prevailing opinions: *Potter v. Saginaw Union Street Railway*, vol. 3, p. 299; *Pierce v. Drew*, vol. 1, p. 571; *Taggart v. Newport St. Railway Co.*, vol. 3, p. 306; *Julia Building Association v. Bell Teleph. Co.*, vol. 1, p. 801; *Louisville Bagging, &c. Co. v. Cent. Pass. Ry. Co.*, vol. 3, p. 236; *Halsey v. Rapid Transit Ry. Co.*, vol. 3, p. 283; *Pelton v. East Cleveland R. R. Co.*, vol. 3, p. 215; *Lockhart v. Craig St. Ry. Co.*, vol. 3, p. 314.

ERROR to Wayne county.

Bill to restrain interference with construction of an electric railway.

Appeal by defendants below. Facts stated in opinion.

Brennan & Donnelly, S. T. Miller, Hoyt Post and W. H. Wells, for complainant.

William Look and H. F. Chipman (Don M. Dickinson, of counsel), for defendants.

GRANT, J.: The complainant was organized in May, 1863, under chapter 94, How. Stat. It has from time to time extended its tracks, under the direction of the common council, upon the streets of the city, until it now has many miles of road and large amounts of money invested. It has, during the twenty-seven years of its existence, been engaged in the business of carrying passengers to and from different parts of the city.

January 3, 1889, the common council authorized the com-

plainant to lay, construct, use and operate a single street railway track in, along and through Mack street, from its conjunction with Gratiot avenue to the city limits. It fixed the rate of speed at not less than six nor more than ten miles per hour. It also provided that, whenever the complainant should deem it advisable, it might substitute in lieu of animal power such system of electric, or other motive power, except steam, as should seem best in its judgment for the purpose of properly and safely conducting its said business in said city of Detroit, upon any or all of its said lines now in use and operated, or hereafter to be used and operated, by said company, and that such change should be made under the supervision of the board of public works. This ordinance was duly accepted by the complainant. Complainant proceeded to construct its tracks upon Mack street, and concluded to use the system of electric motive power instead of horse power. This system is the same as the one involved in the case of *Potter v. Saginaw Union Street Railway*, 83 Mich. 285. The system and the construction of the road are sufficiently described. Complainant was proceeding to erect its poles upon the side of the street fronting the premises of the defendants, the poles being placed 125 feet apart. The defendants interfered with the construction by cutting down the poles, and threatened to continue to do so. The complainant thereupon filed its bill of complaint to restrain this interference on the part of the defendants.

The defendants answered, admitting their action, and claiming their legal right thus to prevent the construction of an electric street railway on the street. They allege that street railway cars, propelled by electricity, cannot lawfully be used on the street in the manner intended by complainant. They deny the power of the common council to permit the erection and maintenance of this electrical apparatus without the consent of abutting property owners, or without condemnation proceedings, and claim that the construction and use of this railway limits, impairs

and impedes the use and enjoyment of their property, and imposes an additional servitude upon the street. They also filed a cross bill praying for a perpetual injunction against the use of such railway.

The case was heard upon the pleadings and proofs, and decree entered in favor of the complainant, the railway company.

1. The act under which complainant is organized is attacked as unconstitutional and void in that it embraces more than one object, which is not expressed in its title.

[This is discussed at length, and decided to be untenable.]

* * * * *

2. It is next insisted that the municipality of the city of Detroit does not possess the power to permit the complainant to operate its cars by electricity, and that, therefore, the complainant is acting without authority of law. The precise claim is that chapter 94 How. Stat. does not authorize the use of this motive power by the companies to be organized under it, but limits them to the use of such powers as were known at the time of the passage of the act and the amendments thereto. Granting this position to be correct, it follows that the action of the complainant is *ultra vires* of the corporation. The obvious and conclusive answer to this claim is that it is a matter between the complainant and the State. The defendants are not in position to raise the question. The mere usurpation of corporate authority does not confer upon the individual the right to bring suit to restrain the unlawful exercise of authority, nor to raise it collaterally. If the State chooses to waive it, or by its silence permit the action, no others can complain, so long as the personal or property rights of the individual are not evaded or affected. It therefore follows that, unless these defendants are injured, they are not concerned in this question. *Spartwout v. Railroad Co.*, 24 Mich. 393; *Jones v. Habersham*, 107 U. S. 174 (2 Sup. Ct. Rep. 336); *Newell v. Railway Co.*, 35 Minn. 112 (27 N. W. Rep. 839); *Railway Co. v. Orton*, 32 Fed. Rep. 471; *Bridge Co. v.*

Prange, 35 Mich. 400. Until the right has been determined in a direct proceeding brought by the State or the city, the complainant may continue the use of such power.

3. It is unnecessary to discuss the proposition that the right of the complainant to use electricity is not conferred by the original act of 1855. By the act of 1867 the right to use any other animal power was expressly conferred, to be exercised under the authority and direction of the municipal authorities. By the act of 1871, section 1 was amended so as to provide for constructing, owning and operating a train railway or road for the conveyance of persons or property, to be operated by horse or other animal power, or by steam, or by pneumatic or any other motive power, or by the combination of them. How. Stat. secs. 3495, 3533. Upon the authority thus conferred the common council of the City of Detroit passed the ordinance above mentioned. In accepting the ordinance, the complainant accepted the provisions of the law as an amendment to its corporate powers. This would be true if its articles of association described its purpose to be the construction of a horse railroad, as it is stated to be in defendants' brief. The language, however, of the articles is broader than this, for its purpose is declared to be the construction of a horse or city railroad, under the act of the Legislature above mentioned.

The general railroad law enacted in 1855 provides for the use of the force and power of steam, of animals, or any mechanical power, or any combination of them. If some new motor (such as a storage battery, which counsel for the defendants in their brief say will no doubt be discovered in the immediate future) should be found to take the place of steam, and thereby dispense with the noise incident thereto, and the discomforts and dirt and smoke, would it be contended that railroad companies could not use it, under the provisions of this law, because it was not known at the time the law was passed? These laws were enacted in times of rapid advancement in the mechanical arts. This advancement is nowhere more forcibly shown than in the

discovery and use of devices and motors to facilitate travel and transportation. It cannot, in my judgment, be held that the Legislature intended to limit these corporations to the use of things that were then known. This rule would be too rigid and technical to merit approval. The common law is more elastic and progressive. It adapts itself to meet the needs of the people, and the advance of science and civilization.

As well it might be contended that when land is dedicated to or condemned for the public use for highways, its use must be limited to the then known methods of travel and transportation. Engines now travel over nearly every public highway in the agricultural portion of the country, propelled by steam, drawing large machines, and stopping at nearly every farm to facilitate the work of the farmers; yet upon this innovation of the use of the highway this same principle was invoked, as is now invoked, to prevent it. *Macomber v. Nichols*, 34 Mich. 212. In this case the defendant was held liable in the Circuit Court for running such an engine along the highway. In his opinion, Chief Justice COOLEY says:

"Persons making use of horses, as the means of travel or traffic by the highways, have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods."

Steam has been used as a motor in the public streets, and its use sustained. *Moses v. Railroad Co.*, 21 Ill. 516. The court in that case say:

"A street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation shall be used. * * * To say that a

new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because the streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age." See, also, *Fulton v. Railway Co.*, 85 Ky. 640 (4 S. W. Rep. 332); *Stanley v. City of Davenport*, 54 Iowa, 463 (2 N. W. Rep. 1064).

The use of electricity causes no greater obstruction or hindrance, and imposes no greater burden upon the streets, than does the ordinary horse railway, except it be by placing posts along the streets, a matter to be hereafter discussed. The electric car does not occupy as much space upon the streets as does the car with the horses attached. It is not more noisy, is cleaner, is stopped and started quicker, moves faster, is more readily controlled, and by its more rapid carriage of passengers, relieves the street to some extent, at least, of travel. These are matters of common observation. Its advantages over horse power are apparent. But it is most severely attacked because it is dangerous, and evidence of accidents, caused by it in this and other States, was introduced by the defendants. Some of this evidence, it appears, was used in the courts of other States, where the use of this power was sustained. It has not, however, been shown in this suit to be so dangerous as to justify the court in enjoining its use. The electric railway is now in use in nearly all of the large cities and many of the smaller ones of the country. I am not aware that any court has yet enjoined its use on the ground of danger. Steam annually causes the loss of many lives and great destruction of property; yet no one has ever sought for that reason to enjoin its use as a motive power in transportation. This matter may be safely left where the Legislature has left it, to the municipal authorities, who presumably will not permit the use of those things which cause unnecessary danger. The Legislature has expressly conferred upon the cities of this State the right to authorize the use of any motive power whatever upon their street railways. Under this power exists the right to authorize

the use of electricity. *Williams v. Railway Co.*, 41 Fed. Rep. 556.

Defendants' counsel cite as an authority *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324. The language then used by Judge BREWER must be considered in connection with the facts. The question there involved was not whether a horse railway company might use any other motive power, but whether, being by its charter limited to the use of horse power, it might restrain another company from using any other power. The complainant in that case was given the exclusive right to build, erect and operate horse railways within the city of Omaha, and five miles adjacent thereto. This was under a special charter from the Legislature of the territory of Nebraska. The defendant was proceeding to construct a cable road, and the complainant sought to enjoin its construction and use on the ground that the defendant's road was included in the term "horse railways." In the opinion is this language:

"Is it probable that it (the Legislature) intended to foreclose the public in advance from all the benefits of possible inventions and discoveries in the matter of street railway travel, and give them to this grantee? Or did it not rather intend that its grantee should take that complete and single thing known as a 'horse railway,' with all of which it was familiar, and *retain for the public all of the unknown possibilities of invention and discovery in reference to modes of street railway travel?*"

In the present case, under the authority of the Legislature, the people are reaping the benefit of just such inventions, the use of which is authorized by the broad and comprehensive language of the act, as was evidently intended.

4. This brings us to the important question, viz., does the use of the street for street railways impose such new burden and servitude, additional to what was implied by the dedication, that it is beyond the power of the city to authorize their construction without additional compensa-

tion to abutting lot owners? As already shown, no restrictions are placed upon the city in granting these franchises. The lot owner sustains a threefold relation to the street:

1. As one of the general public.
2. As owner of the reversionary interest to the center of the street.
3. As owner of a lot, possessed of the right of ingress and egress to and from the street.

In the first relation he has the right, in common with every other member of the public, to the use of the street. The fact that vehicles pass along the street upon tracks level with the bed of the street, and leaving sufficient room for him to pass on foot or with his vehicle, does not interfere with his right. The fact that he is compelled to turn aside, when meeting or passing a car upon the track, is an incident to the use of the street but no infringement of any right possessed by him. He is not thereby hindered, delayed or obstructed in his passage. Free passage is all the law gives him.

In condemning land for the use of streets and highways, the owner receives as damages the full market value of his land. After it has been condemned or dedicated, there is no such thing as damage to his reversionary interest, caused by any use which is a public one. Whatever may have been the ancient adjudications limiting the rights of the public in the streets to passage and repassage, and whatever may now be the rule with regard to highways in the country, with the growth of population in our cities have come increased needs for heating, lighting, draining, sewerage, water, etc., and with these has come also a corresponding extension of the public rights in the streets. Immense sewers and water mains may be dug, and the soil removed, culverts and drains constructed, without compensating the abutting owners. It may now be considered the well settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it. Ang. Highw., section

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312; *Town of Palatine v. Kreuger*, 121 Ill. 74 (12 N. E. Rep. 76); *Murray v. Commissioners*, 12 Metc. 45; *Pierce v. Drew*, 136 Mass. 75; *City of Boston v. Richardson*, 13 Allen, 146.

So far, then, as these defendants are concerned, it is immaterial whether they or the city own the fee in the street. The rights are the same in either case. So long as they are unobstructed in the use and enjoyment of their property, having convenient ingress and egress, and the use of the street is an authorized and proper public use, they have no legal cause for complaint. It is evident that street railways, when constructed so as not to interfere with the rights of others upon the street, form no obstruction to such use and enjoyment. They make no more noise than the omnibus or other heavy vehicles, are not more dangerous and do not interfere with access to the abutting lots. They constitute a modern and improved use only of the street as a public way. These improved methods become necessary in populous cities. The use is the same; the methods only different. Without them, clerks and workmen and women could not be provided with cheap and rapid transit from their working places to the suburbs of the city, where they may have cheap and comfortable homes. These views are in accord with the clear weight of authority. *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Railroad Co.*, 50 id. 206; *Mahady v. Railroad Co.*, 91 id. 148; *Pierce R. R.*, 234; *Elliott v. Railroad Co.*, 32 Conn. 579; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75; *Attorney-General v. Railroad Co.*, 125 Mass., 515; *Eichels v. Railway Co.*, 78 Ind. 261; *Hobart v. Railroad Co.*, 27 Wis. 194; *Brown v. Duplessis*, 14 La. Ann., 843; *Railway Co. v. Railway Co.*, 31 Kan. 660 (3 Pac. Rep. 284); *Smith v. Railroad Co.*, 87 Tenn. 626 (11 S. W. Rep. 709); *Citizens' Coach Co. v. Railroad Co.*, 33 N. J. Eq. 267; *Briggs v. Railroad Co.*, 79 Me. 363; *Taggart v. Railway Co.* (R. I.), 19 Atl. Rep. 326; *Clement v. City of Cincinnati*, 16 Wkly. Law Bul. 355; Cooley Const. Lin. (6th ed.), 683; 2 Dill. Mun. Corp., sec. 772; Mills Em. Dom., sec. 205.

They are also in accord with reason and common sense. It is the view unanimously adopted by this court in *Grand Rapids & I. R. R. Co. v. Heisel*, 38 Mich. 62 (decided in 1878). It is true that this question was not directly involved in that suit, but the extent of the use of streets was involved. The question appears to have been carefully examined by the court, and the authorities are cited, while it may be termed "dictum," still it comes to us as the deliberate opinion of the learned justices who then constituted the court, and as such is entitled to great weight. That decision clearly voiced the practical construction which had theretofore been placed upon these laws by the people, and upon the faith of which many such roads had been built in many cities of the State, and vast sums of money invested.

We are cited by defendants' counsel to *Taylor v. Bay City Street Railway Co.*, 80 Mich. 77. The distinction between that case and the present one is too clear to require comment. The former was decided upon the express terms of the charter of Bay City. The charter of the city of Detroit contains no such provisions. The question here involved was not there even discussed.

5. It is also insisted that the poles interfere with access to the abutting property, and therefore constitute an invasion of private rights. It cannot be seriously claimed, under the evidence in this case, that these poles interfere with the present occupancy of the land; this is virtually conceded; but defendants insist that, in platting lots and selling them, it will be necessary to take them into consideration. This is a contingency which may never happen, and therefore no damage may ever result. Should it ever happen, the common council have ample power to require and compel these poles to be so placed as to create no such interference. Failing in this, the defendants have an ample remedy in the courts. Such contingencies are too remote to form any basis for an injunction or for damages.

It has frequently been held that telegraph and telephone poles are not necessarily erected to facilitate the use of the

streets, and consequently that they create an additional servitude. But the authorities are by no means uniform. To the contrary are *Julia Bldg. Ass'n v. Bell Teleph. Co.*, 88 Mo. 258; *Pierce v. Drew*, 136 Mass. 75. These decisions are based upon the doctrine that the whole beneficial use of the land has been taken and appropriated to the public, and that one of the original uses of a highway was the transmission of intelligence. One of the first cases to make this distinction was *Taggart v. Railway Co.*, *supra* (decided in January, 1890). Referring to this case, Judge DILLON says:

"The distinction * * * is so fine as to be almost impalpable and it suggests serious doubts whether both conclusions are sound and reconcilable. The general subject awaits further development and settlement." 2 MUN. CORP. (4th ed.), p. 893, note.

The learned author does not state which he believes to be the correct principle. Since then the question as to whether the erection of poles for electric street railways constitutes an additional servitude has been several times before the courts, and thus far they have been held to be ancillary to a proper use of the street, and to create no such additional servitude. *Louisville, etc., Manfg. Co. v. Railway Co.* (Ky.); *Halsey v. Railway Co.* (N. J.), 20 Atl. Rep. 859; *Pelton v. Railroad Co.*, 22 Wkly. Law Bul. 67; *Lockhart v. Railway Co.* (Penn.), 21 Atl. Rep. 26.

These poles used by the complainant are a necessary part of its system. When they do not interfere with the owner's access to and the use of his land, we see no reason why they should be held to constitute an additional servitude. Certainly they constitute no injury to his reversionary interest. To constitute an additional servitude, therefore, they must be an injury to the present use and enjoyment of his land. But they do not obstruct his light or his vision, as do the structures of an elevated railroad. Neither they, nor the cars they assist in moving, cause the noise, steam, smoke and dirt which are produced by steam cars. They do not interfere with his going and coming at his pleasure

when placed as they can and must be, so as to give him free access. Wherein, then, is he injured? If it be said that they are unsightly, and therefore offend his taste, it can well be replied that they are no more so than the lamp post or the electric tower. It is as necessary that rapid transit be furnished to a crowded city as it is that light should be furnished to its streets. Public convenience and necessity must control in all such cases.

We have thus far discussed the questions involved upon the assumption that sufficient room was left to permit the free passage of teams and vehicles when the cars were upon the track. It is claimed by the defendants that this space is not sufficient for that purpose. If this be so, it is evidently owing to the condition of the street, which is neither graveled nor paved, and to the nature of the soil, which in wet times is very muddy and difficult to travel. Such was its condition at the time this controversy arose, and it so continued during all the time to which the testimony was directed. The complainant's track is in the center of the street. Its grade was established by the city engineer, and presumably the grade of the street, when established, will be the same as the grade of the railway. The poles are about 21 feet 7 inches from the center of the road, are placed between the ditch and the sidewalk, and average 10 feet 4 inches from the fence line. The track is 4 feet 8 inches wide, and the cars are the same width as the ordinary horse cars. The distance from the rail to the pole is about 19 feet. This space is ample for the passage of teams and vehicles, if the streets were properly graded. The evidence upon this branch of the case is entirely unsatisfactory, and insufficient to enable us properly to determine the question. It is apparent, both from the opinion of the learned circuit judge and the exhaustive briefs of counsel, that this was a matter of minor consideration in the court below, the main desire being to settle the other important questions involved. The road bed and track were first constructed, and no steps were taken to enjoin the complainant when engaged in that work, and no

objection appears to have then been made. No trouble arose until the complainant commenced to erect its poles, which were at first claimed to have been erected outside the street limits upon the defendants' lands, but which are clearly within such limits.

Under this record we can only announce some general principles, leaving the defendants without prejudice to pursue such remedy as they may have when they can establish a violation of their legal rights.

1. The complainant cannot lawfully construct and operate its road in a street too narrow to admit the passage of its cars and other vehicles at the same time, nor so construct it as to interfere with the rights of the general public in the street. *Grand Rapids St. Ry. Co. v. West Side St. Ry. Co.*, 48 Mich. 433.

2. Nor in a street, though of sufficient width, if its condition be such that the operation of the railway will result in the practical exclusion of others from the use of the street. A railway so constructed and operated would be a public nuisance, and the courts would abate it.

3. The complainant's roadbed and track must be built substantially with the level of the street, so as to permit vehicles to cross without difficulty.

4. The poles must be so placed as not to interfere with the right of ingress and egress to abutting property.

It is insisted that the court was in error in excluding testimony as to the dangers and actual perils witnessed by persons from the use of the new method of transit, for the reason that this testimony had a bearing upon the interference with the customary use of the street. This question arose three times upon the hearing. On the first two occasions the testimony ruled out referred entirely to the tendency of these cars to frighten horses. The court made its third ruling at the close of the testimony of one Mrs. Rascher, who had testified to the decrease of travel upon the street, to the frightening of horses, and the decrease in rents. The court then announced that eight or ten witnesses had testified to the condition of the road, and no

more testimony would be allowed on that point. Defendants' counsel announced that they had a large number of witnesses to the same effect, and asked permission to call two or three more. The court said that five or six witnesses to any particular fact was sufficient, and that it was clearly within its discretion to limit the number of witnesses; that as to the points already covered, defendants would not be permitted to call more witnesses, but as to any new facts they might call more. The circuit judge was clearly right in this exercise of his discretion. Beyond this exercise of discretion the court, upon the hearing in equity cases, can exclude only such testimony as is scandalous and impertinent.

The decree of the court below is affirmed, with the costs of both courts.

LONG, J., concurred with GRANT, J.

CHAMPLIN, C. J.: I am not prepared to say that the construction of a street railroad track in a street is of itself no additional burden or servitude upon the street. I think it is, but to what extent depends upon all the facts and circumstances under which it is imposed. If the circumstances are such that in a narrow street, or in the mode of construction, it becomes a nuisance to the property owners or the public, as pointed out by my brother GRANT, I think the additional servitude would be quite apparent. If in any case it is such an invasion of private rights as to cause damage to the owner of the fee of the soil or abutting proprietors, I think they have a legal remedy to recover such damage in a suit at law. And so with regard to the setting of poles to aid the propulsion of cars by electricity. I do not think, ordinarily, it is such a taking of private property as requires condemnation and compensation before the poles can be set, but I think, if the owner suffers damage on account of the erection of poles, he should seek his remedy at law for such damage.

I concur in the result reached by my brother GRANT for the reasons:

1. That the complainant was proceeding under color of legal authority to construct its railroad.

2. I think the defendants have a complete legal remedy for all injuries complained of in their cross bill.

NOTE.—MOGRATH and MORSE, JJ., each wrote long dissenting opinions, the gist of which is contained in the following language with which Justice MOGRATH begins his opinion :

"The case hinges upon the question as to whether or not the construction and operation of a street railway in a street, and, as incident thereto, the placing of poles therein upon which are to be stretched electric wires, is a new servitude ; and I am clearly of opinion that a street railway, whether operated by animal power, electricity or steam, is an additional burden."

The case of *Merrill B. Mills v. Henry N. Brevoort*, Circuit Judge, Michigan Supreme Court, Oct. 30, 1889, 77 Mich. 210, was an application for a mandamus to compel the respondent to vacate the injunction under consideration in the above reported case. The application was denied, the court intimating its preference to consider the whole matter on the merits upon an appeal.

The defendants were allowed to add to their answer a claim for the effect of a cross bill.

In the foregoing seventeen cases, relative to the rights and remedies of adjacent property owners, in respect to the maintenance of electrical appliances in streets, is illustrated the rapid growth of one fruitful source of litigation, especially with reference to electric street railways.

Volume 1 of this series contains, in complete opinions or memoranda, ten cases concerning the rights of abutting owners, seven of which are concerned with telegraph or telephone and the other three with electric light apparatus.

In vol. 2 there are but six cases, five having reference to telegraph or telephone and one to electric railway.

Of the seventeen cases in this volume three each pertain to telegraph or telephone and electric light, while in eleven cases the electric street railway is concerned.

Leaving out of consideration the question of telegraph lines upon railroad rights of way, which are considered in the note to *American Teleph. & Tel. Co. v. Pearce*, ante, p. 169, thirty cases have now been reported in this series upon the rights of abutting owners, as affected in twelve cases by the appliances of the telegraph or telephone, in twelve, of the electric railway, and in six, of those used in the business of electric lighting.

In considering these cases, it will be observed that some relate to the abutting owner's rights purely as such, without reference to any special damage which he may sustain ; while in others his right to convenient ingress and egress, light and air, &c., were in question.

I believe there is no case in which the latter right is denied.

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In the following cases it was expressly affirmed : *Tiffany v. U. S. Illum. Co.* (N. Y.), vol 1, p. 629 ; *H. Clausen & Sons Brewing Co. v. B. & O. Tel. Co.* (N. Y.), vol. 2, p. 210 ; *Chesapeake & Pot. Teleph. Co. v. Mackenzie* (Md.), *ante*, p. 196 ; *Pelton v. East Cleveland R. R. Co.* (Ohio), *ante*, p. 215.

In the following cases, however, a temporary injunction was denied where special injury was alleged, upon the ground that the public benefit would be greater than the private injury, and that the plaintiffs would have a complete remedy at law. *Hewett v. W. U. Tel. Co.* (D. C.), vol. 2, p. 222 ; *Tracy v. Troy & Lansingburgh R. R. Co.* (N. Y.), *ante*, p. 227 ; *Potter v. Saginaw Union Street Ry.* (Mich.), *ante*, p. 229.

Upon the other question, whether or not the maintenance of electrical appliances in streets constitutes a new servitude for which the abutting owner is entitled to compensation, there appears to be a difference of opinion with reference to the telegraph, telephone and electric light, as illustrated by the following cases reported in this series :

In Ohio (*Smith v. Cent. Tel. Co.*, vol. 2, p. 237), in Illinois (*Board of Trade Tel. Co. v. Barnett*, vol. 1, p. 565), and in Virginia (*W. U. Tel. Co. v. Williams*, *ante*, p. 237), it is held that the use of streets for telegraph purposes imposes an additional burden ; while in Massachusetts (*Pierce v. Drew*, vol. 1, p. 571), it is held that it does not.

In New York (*Met. Teleph. & Tel. Co. v. Colwell Lead Co.*, vol. 1, p. 663), and New Jersey (*Broome v. N. Y. & N. J. Teleph. Co.*, vol. 2, p. 259), it is held that the maintenance of telephone lines imposes a new servitude ; while the contrary is held in Louisiana (*Irwin v. Gt. So. Teleph. Co.*, vol. 1, p. 709), and Missouri (*Julia Bldg. Assn. v. Bell Teleph. Co.*, vol. 1, p. 801).

As to the use of the streets for electric light purposes, that a new burden is created is held in Ohio (*McLean v. Brush El. Lt. Co.*, vol. 1, p. 488), and the contrary in New York (*Tuttle v. Brush El. Lt. Co.*, vol. 1, p. 508) ; though doubted as to private lighting (*People, ex rel. McManus v. Thompson*, vol. 1, p. 554 ; *Consumers' Gas & Elec. Light Co. v. Cong. Spr. Co.*, *ante*, p. 211 ; and *Johnson v. Thomson-Houston Elec. Co.*, *ante*, p. 203).

There seems to be no difference of opinion as to the use of streets for electric railway purposes, all authorities agreeing that this use, which facilitates travel, is an ordinary street use for which the original compensation to the abutting owner was made.

THE ROCKY MOUNTAIN BELL TELEPHONE COMPANY V.
THE SALT LAKE CITY RAILWAY COMPANY.

District Court of Utah Territory, Third Judicial District, Salt Lake

County, July 23, 1889.

(From private print.)

WIRES IN STREETS.—INTERFERENCE.—INJUNCTION.

Application of a telephone company for an injunction to restrain an electric railway company from erecting overhead wires so as to interfere with the operation of telephone wires, by induction, contact, leakage or otherwise, denied, it appearing that there was no probable danger from induction, and that the other contemplated dangers were uncertain; in short, there being no sufficient evidence of irreparable injury to warrant an injunction.

P. L. Williams, attorney for plaintiff.

J. L. Rawlins, attorney for defendant.

ZANE, J.: This is a case in which the plaintiff asks for an injunction against the defendant, restraining it from using its (defendant's) wires, so as to interfere with the use of the telephone wires. The plaintiff insists that the defendant had no right upon the streets mentioned in the complaint, and the defendant also takes the position that the plaintiff has no legal right there. I am disposed to regard these parties as occupying the streets mentioned in the complaint rightfully, with all the rights that can be conferred upon them by the city council. They are there, however, with certain duties to perform. It is the duty of each one to use reasonable precautions to protect its own interests, and to prevent injury to the other, or any other person or corporations.

It appears from the evidence of this case on this motion that the telephone wires were erected first, and the street car wires, or portions of them, have been hung, and are now being hung, upon posts within a distance of about eight feet most of the way, some places farther than that. They are both using a natural agency, one for the communication of sound, or, we may say, the human voice, at a distance; and the other for the purpose of communicating motion propelling street cars, and each has a valuable franchise and a considerable sum of money invested, and it is the duty of the court to protect the rights of each. It appears from the evidence that there is a force communicative from one wire upon which electricity is being conducted to another wire which is used for the same purpose within a certain distance. This is known as induction. It is communicated without contact; it seems to extend out from the wire upon which this current is passing through the atmosphere or other matter to the other wire; and if the current is sufficient it affects the other wire at some considerable distance. In this way the railway wires contain a greater amount of electricity than the telephone wire, and it is used for a different purpose. The use to which electricity is applied in the telephone wire is very delicate in its operations. It conveys sound and articulate sound; it conveys the human voice, and, of course, must be free from confusion and noise; and it seems that the noise and confusion that attend the operation of the wire of a street railway are communicated by means of this inductive force to the other wire; but I am of the opinion that at the distance these wires are apart, and the distance for which they parallel each other, and in view of the amount of electricity conveyed upon the street railway wires, there will be no substantial interference with the telephone wires for that reason. Communication of messages upon the telephone wires will not be impeded by induction, as I think, to any substantial degree.

It appears also from the evidence that the electricity upon the circle of the street car wires and rails, and the earth,

when used as a circuit, is liable to what is known as leakage, that is, the leakage would be from the metallic conductor, consisting of the street car track. It seems that the earth, wherever there is moisture or metal in it, is a common field in which this element or agency known as electricity travels at great distances. Whether it travels or its effects are felt upon itself is a question which I am not prepared to decide. The force of electricity, when it escapes from the metallic conductor into the earth where there is moisture, may be felt at a great distance; and it is like other natural agencies, when a person accumulates and gets possession of a sufficient amount and attempts to use it, he must take care of it, and see that it does not do any damage to persons or property; it must be confined and controlled like cattle or other animals or agencies. Of course you may confine domestic animals by fences to prevent them from straying on to other people's property and damaging crops. So with this electricity; it may be kept upon metallic conductors, because it seems as though one peculiarity of it, when used as it is used in telephone wires and street car wires, is that there must be a circuit. The effect must pass back to the other poles. It seems to have two sides, and the party using it may keep control of it by insulating the road upon which it travels, or the conductor.

Now, if the street car company has ground connections, that are connected with the dampness in the earth, at some considerable distance from any grounding of the telephone company, the effects of electricity from the street railway conductor get into the earth and pass on to the wires of the telephone company, and, there being more of it, like all other forces of which we know anything, the stronger overcomes the weaker; and it seems to go there with a good deal of noise and confusion — carries with it the noise and confusion attending the operation of the street railway, and prevents communication upon the telephone wires. Whether, situated as these lines will be when the street railway is completed, the telephone wires will be effected by

leakage, as it is called, by direct communication, either by means of the earth or some other medium, it is not perfectly clear. They probably will be to some extent; there will be some interference; but it seems from the weight of the evidence that either of these parties can prevent this from this cause, by insulating their conductors.

The earth seems to be a common field in which electricity roams and exists, as well as the atmosphere in damp conditions. The question is, whose duty is it to insulate his property, so to speak — insulate his conductors in which he is using this natural and exceedingly subtle force of nature, for their own benefit and the benefit of the public; because both these companies are not only operating these enterprises for their own benefit, but for the benefit of the public, and the convenience of the public. By illustration, in some cases people are required to fence their stock; in others, they are required to fence their fields. Now, assuming that the wires of the plaintiff, unless one or the other or both of these wires are insulated, will be affected, the question is, as either can insulate its wires, which ought to do it. A person, whether natural or artificial, in using any agency that is dangerous and may cause injury to others, ought to use all practicable means to prevent injury; and any person, whether natural or artificial, that is using property which may be injured by that of others, ought to use all reasonable and practicable means to protect their own property. Whether it is the duty of the street railway company to insulate its wires, or the duty of the telephone company to insulate its wires, I hardly deem it necessary to decide at this time, because there is so much uncertainty as to whether the injurious effects from the want of insulation will follow the use of these wires; there being so much uncertainty about it, I am not disposed now to decide that question. If, when the road is put in operation, it appears that the street railway company, by its operation and use of electricity, injures substantially the plaintiff, in preventing and impeding the use of its telephone wires, then the application can be presented. It is a

question about which there might be a difference of opinion as to which of these corporations should insulate its wires. It depends, of course, largely upon the practicability of the insulation by either. If it is practicable for one to insulate its wires, and impracticable for the other, without great difficulty and great cost, far in excess of that of the other, it would seem reasonable and right that the one that has the practicable means of doing it should make use of it. I am inclined to think, from the evidence, that it is perfectly practicable for either of these corporations to insulate its wires. It may be that the street railway company can insulate its wires with less difficulty and at less expense. If the insulation has to be so extensive as some experts have indicated in their affidavits and communications, then, of course, it would be very expensive and difficult; but I am not disposed to think that all difficulties are real. These experts, while I have no doubt they are very competent men, when they are not practical, adopt theories that seem unreasonable, to the uneducated minds at least, and of course theory and practice, when the theory is the true one, must always agree. It turns out that theories very often do not agree with practice. The results in that show the theory not true.

It is also insisted by the plaintiff that the wires of the street car company, as they will be strung upon its poles, will be dangerous to men employed by the telephone company, and may be dangerous to its property. If the wires of the telephone company come in contact, by any means, with the wires of the street car company, it is claimed (and there is some evidence tending to show) that the effects may be dangerous to persons handling wires in stringing these upon the poles and repairing, or may produce fire at the stations of the telephone company. I am disposed to believe, from all the evidence, that there is no such danger if the telephone company use due care in stringing its wires and in repairing them, and I am disposed to believe that the amount of electricity used by this street car company on its wires, if brought in contact with the wires of the

telephone company, will not be likely to produce injury to any great extent. Of course, if the injury is produced by the negligence of either, the one guilty of negligence must bear the loss. If injury is produced to the telephone company by the negligence of the street car company, then of course the telephone company could recover damages.

The court will not grant an injunction except it be to prevent irreparable injury, or to prevent the multiplicity of suits, and it must be established by a preponderance of the evidence that the injury would be likely to occur before the injunction is granted. In view of all the evidence in this case, I am disposed to hold that the injunction ought not to issue. If at some future time it is found that the effects of the operation of this street railroad, and the use of electricity as it is proposed to be used on its wires, produces different effects from what appears probable now, from the evidence, then an application can be made and the matter can be heard and decided in the light of better evidence than the court now has. The motion is denied.

NOTE.—This case is cited in *Louisville Bagging Mfg. Co. v. Cent. Pass. Ry. Co.*, ante, p. 286.

See note to *Cincinnati Ina. Pl. Ry. Co. v. City, &c. Am.*, post; also, note to next case.

THE ROCKY MOUNTAIN BELL TELEPHONE COMPANY V.
THE SALT LAKE CITY RAILROAD COMPANY.

*District Court of Utah Territory, Third Judicial District, December,
1889.*

(From private print.)

WIRES IN STREETS.—INTERFERENCE OF USES.—INJUNCTION.

An application by a telephone company, for an injunction restraining an electric railway company, a later licensee, from so maintaining its wires in the streets of a city as to interfere by induction and conduction with plaintiff's telephone service, was denied, although the telephone company had the earlier license to maintain its line in the streets and it appeared that the use of the double trolley system would tend, though imperfectly, to remove the trouble; it appearing that it was in the power of the plaintiff to adopt an effective remedy, to wit, the metallic circuit, which it had not tried. Importance was also attached to the fact that the defendant's use was and the plaintiff's was not within the purposes of street dedication.

ZANE, Judge: This is an application to the court by the Rocky Mountain Bell Telephone Company for an injunction restraining the Salt Lake City Railroad Company from use of an electric current, by the devices it now employs, as a motive power to propel its cars on the streets mentioned in the complaint.

In 1880 A. J. Patterson & Co. placed their telephone poles and wires in the streets, under an express license from the city, and in 1883 that company transferred all its rights with respect to the telephone so far as it legally could to the plaintiff, and the latter has occupied the streets with its poles and wires ever since. And in 1887 the plaintiff moved its line of poles on First South street from the side to the center of the street by the permission of the city; and in May, 1889, it removed its line on South Temple from the side to the centre of that street by a simi-

lar permission, and as changed has continued to use both lines.

The defendant insists that such continued occupation of the streets by the plaintiff is unlawful, because it never obtained a license from the city to do so. In view of the fact that the city has the control of the streets, subject to the right of the public to use them as a highway, and of the fact that the plaintiff has continued to occupy them since the transfer, without objection by the city; and in view of the further facts that on two occasions since the plaintiff became the owner of the telephone, the city gave its consent to the removal of the poles and wires from the sides of two of the streets to their centres, its consent will be presumed until an objection is heard from it.

The defendant was incorporated in 1872, under an act authorizing the incorporation of railroad companies; and the purpose of the incorporation mentioned in its articles was to construct, own, maintain and operate a street railroad for carrying passengers within the corporate limits of Salt Lake City; and inasmuch as electricity for the propulsion of cars was not then in use, the plaintiff insists that the defendant was not authorized to employ it as a motive power in the operation of its railroad. The authority to operate the road, without mentioning any particular power to be used in so doing, authorized the employment of any safe and appropriate force then in use, or that might be brought under human control by new inventions, and employed for such a purpose.

The plaintiff is using the electric current to transmit speech on wires strung on poles set in the same street in which the defendant is using a more potent current, upon wires strung on other poles for the propulsion of street cars.

The trolley wire of the street car is seventeen feet from the ground and the feed wires fourteen inches higher. An ordinance of the city requires the telephone wires to be as much as thirty feet high. In places they are that high, but in other places they are not, and for the distance of

almost forty rods they are but three feet and six inches above the feed wire of the defendant.

The plaintiff uses the ground circuit and the defendant uses the rails with connections at their joints to complete its circuit; but they are so connected with the ground that an earth distribution occurs. With the speech conveyed by the plaintiff's current enough of the noise made by the defendant in its operations often reaches the ears of the plaintiff's subscribers to impede and confuse the understanding, and in some instances to prevent communication. It also appears from the evidence that the annunciators often fall and the bells give false calls; and on one or two occasions telephone instruments at the central office were burned out, causing considerable damage.

The co-operation of the human tongue, the electric current and the human ear in communicating thought from mind to mind, is one of the latest and most difficult achievements of human ingenuity. In this communication the electric current becomes a most sensitive and delicate agent, and to perform perfect work it must be free from all disturbance—all other currents must be excluded. Not so for the electric current employed for the propulsion of cars or the current used for the production of light.

It appears from the evidence that the effect upon the telephone instruments and the interference with communication is from two causes, induction and conduction, and that a variable electrical current on one wire induces another current in a neighboring wire more or less parallel to it (this action is termed induction); and that conduction is communication between two conductors when they are in contact.

It appears from the evidence that the telephone instruments were burned out in consequence of the telephone wire coming in contact with the trolley wire or wheel; that the dropping of the annunciators was from the same cause or from earth distribution, and that the noise at the telephone was from both induction and conduction. It also appears that the extent of the disturbance from earth distribution

depends upon the distance between the groundings of the two currents. In view of the distance the wires of the respective parties in this case parallel each other, the probabilities are that telephoning would not be seriously interfered with from induction if they were placed fifteen feet apart, and that it would be slight in comparison with what it now is if they were separated twelve feet; for the rule is that induction exerted between parallel lines is inversely proportioned to the square of the distance between them and directly proportioned to the distance of exposure.

The plaintiff says that the evidence shows that the defendant could prevent the interference by adopting the double trolley system, and that that system can be successfully used in propelling defendant's cars. By that system the current returns from the motor under the car by means of a second trolley arm, and other devices similar to these upon which it goes out from the dynamo to the motor.

A preponderance of the evidence shows that this system would substantially prevent the effects of induction on the telephone wires, and also earth distributions, and that its adoption by the defendant upon the roads now in use, and those projected and in process of construction, would cost a large sum. While this system may be practicable when employed on a straight road with a double track, the probabilities are that its use on a single track, with turn-outs, switches and curves, would be attended with great difficulty, and that it would not be a mechanical or commercial success. As the subtile force the parties are using, of which so little was known until a comparatively recent period, may be brought under more complete control by the use of better devices, or new inventions, or greater skill, these difficulties may disappear, but the court can consider this case only in the light of the known.

There is evidence tending to show that street cars may be operated by means of the electric battery system; but the weight of the evidence goes to prove that the system has not as yet been successful; experience has not yet demon-

strated its entire practicability as a motive power to operate railroads.

The most appropriate part of a street upon which to operate a street railway is the center of it. The different modes of travel occupy the part indicated by convenience and safety. Accordingly, footmen take the sidewalks, cars upon a track the center, and wagons and other vehicles and horsemen the entire street between the sidewalks, except the center when occupied by passing cars. The individual on a passing car is a traveler on a public street, as the one who rides alongside in a hack or on the back of a horse, and that part of the street occupied by street car travel is as much devoted to public travel as that occupied by travel in vehicles or on horses or on foot. It may be more convenient and to the interest of some to go on foot on the sidewalks, and more convenient and to the interest of others to ride in carriages in the street, and more convenient and to the interest of others to ride in street cars—the latter is a very cheap and convenient way of travel, and it would seem reasonable and right that those wishing to go in that way should have the privilege. Streets are set apart for the people to travel on as their necessities or their preferences may suggest. The use of a street for that purpose by the instrumentality of a street car is consistent with the object of its dedication. While the occupation of a street with telephone and telegraph poles is often permitted, such a use can hardly be said to be within the purpose of its dedication. The public safety and convenience require such poles to be set on a line that will not obstruct travel. They are usually placed as much as a hundred feet apart along the outer edge of the sidewalk, and where they do not interfere with travel. A street car line at that place would obstruct the approach to a communication with buildings on that side of the street. But in view of the fact that the use of the electric current on wires at that place may be interfered with by the branches of trees, and of the fact that street car tracks near the sidewalks are objectionable, the most appropriate line

for all such poles is the center of the street, unless the use of two or more electric currents in such proximity would render the use of the one or the other, controlled and protected by all reasonable mechanical devices impracticable.

Professor Amos E. Dolbear, in his testimony, says "that there are various ways in which the trouble of the telephone may be prevented." Among them he mentions the McCluer system, "which consists of a conducting wire stretched parallel with the other telephone wires, through districts distributed by such currents as come from either telegraph or electric light or electric railway works." The weight of the evidence is to the effect that this system is a remedy for disturbances from leakage or conduction, but somewhat imperfect for disturbances arising from induction. With the telephone wires as much as ten feet from the car wires, probably this system would prevent all serious disturbances in this city.

The same witness says: "The better way is to provide a return conductor for each telephone — a complete metallic circuit without contact with the earth; this removes interference from that source entirely;" and as to trouble from induction, he says: "When the two wires are near to each other, parallel in the air, and at an even distance apart, any inductive action that takes place from a current in a neighboring conductor acts similarly on each wire, and therefore they annul each other's effect upon the telephone circuit, and there will be no practicable disturbance." Of this last system, George W. Mansfield, electrical engineer of high standing and wide experience, says: "It is the universal sentiment of all telephone people that a perfect system will not be attained until they have a metallic system complete for all their trunk lines and exchanges; that all the circuits of the American Telegraph and Telephone Company are metallic. They use no ground circuits whatever, and by means of the metallic circuits they are enabled to talk from Boston to New York, Philadelphia, Buffalo, Albany, and expect ultimately to reach Chicago. By means of the metallic circuit they suffer absolutely no disturbance from

outside influence." The change from the present system used in Salt Lake City, one in which the earth is used as a conductor to complete the circuit, to a complete metallic circuit, would cost a large sum of money, but its use would furnish a remedy for all interference from electric currents, whether from street cars, electric light, telegraph or earth currents.

This brings us to the question: Ought the court, while the complainant continues its business as it now is doing without adopting any other devices or means to prevent the injury complained of, require the defendant to adopt the double trolley system, and, in the event it does not do so, to enjoin it from operating its road by means of the electric current? In the light of the evidence the double trolley system appears to be more cumbrous than the single now in use by the defendant, and were it employed by the defendant upon its roads with its single track with numerous turnouts, switches and curves, its use would probably be attended with annoying delays and loss of time to the traveling public as well as additional expenses. It is true that the metallic circuit would be more expensive to the telephone company, but it furnishes a more perfect system and service, in fact the best that human invention and skill has devised or probably can devise.

The air and the earth are common fields for electric currents, and man is not responsible for the action of natural forces affected alone by natural causes, but when he takes them in hand by means of his skill and his mechanical devices, and employs them in his service and arouses and excites them, he does become responsible for them, his will then controls their action, and he receives the benefit of their labors.

The plaintiff's right to use the electric current by means of wires upon poles set in the streets was prior in time to the right of the defendant to use the same agency by means of wires and poles in the same streets; nevertheless, it is the duty of each in the enjoyment of its right to use all reasonable care to prevent injury to the other. The law

will protect each in the enjoyment of its rights, but it will not protect in the negligent employment of it; the protection does not include negligence; priority in time could not give the plaintiff any immunity from the use of reasonable care. It is the duty of every person to employ all reasonable means to protect himself and any valuable right that he may possess from injury if he wishes to hold any other person responsible for the loss that he causes. A person in the enjoyment of a valuable right of property or otherwise about to receive irreparable injury from the enjoyment of some other right by another which either might prevent by the use of reasonable means, cannot obtain any injunction restraining the other from the enjoyment of his right until he adopts such reasonable means. In such a case a party about to be injured holds the remedy in his own hands and the law requires him to use it; he can claim nothing on account of his own wrong. Anybody may enjoin the negligent use of a right by another about to cause irreparable injury to the enjoyment of his own right which he has used due care to protect.

Assuming that the use of the metallic circuit would remedy the evil complained of, and that its use is equally practicable by either party to the action, the court will not enjoin the use of the ground circuit by the defendant while the plaintiff continues to use it. It appears from the preponderance of the evidence that the use of the electric current by the plaintiff is practicable, while its adoption by the defendant would be an experiment: its practicability does not appear to be established.

The prayer of the complainant for an injunction is denied.

NOTE.—This and the preceding case were between the same parties, the application in the earlier case having been dismissed because prematurely brought, the danger of the threatened injury not being apparent. Upon this second application the fears of the plaintiff were shown to have been well grounded, and the court was forced to examine the legal principles involved.

See note to *Cincinnati Inclined Plane Ry. Co. v. City, &c. Assn.*, *post*.

NEBRASKA TELEPHONE COMPANY, Appellant, v. YORK
GAS AND ELECTRIC LIGHT COMPANY, Appellee.

Nebraska Supreme Court, Sept. 17, 1889.

(27 Neb. 284.)

WIRES IN STREETS.—INTERFERENCE.

(Head-note by the court):

In an action instituted by a telephone company to enjoin an electric light company from erecting its poles and wires in the same street upon which the telephone wires were placed, it was shown by sufficient evidence that the ordinance giving the authority to the electric light company to erect its poles and wires upon the street was passed, and said company had constructed its plant, and erected a part of its poles and wires, had decided upon the streets and public ground which it would occupy, and notified the telephone company of the fact, before it had constructed its lines thereon, and which the officers and agents of the telephone company stated would be satisfactory to them, and had also commenced the erection of its line on the streets designated when the telephone company erected its poles and wires on the designated line, which was immediately followed by the erection of the electric light poles and wires. It was *held*, that the finding of the District Court that the electric light company first occupied the street was sustained by the evidence. In such case, where there was sufficient evidence to sustain the finding of the above fact, the trial court would be justified in refusing an injunction against the electric light company restraining it from occupying the streets in question.

It having been shown upon the trial, and practically admitted by the attorneys and witnesses for the electric light company, that the erection of the telephone wire near the electric light wire would not injure the usefulness of the electric light wire, and no affirmative relief having been demanded by the answer or sought at the trial, a decree of the District Court restraining the telephone company from placing its line of wires near the wires of the electric light company was to that extent reversed.

APPEAL from the District Court of York county. Facts stated in opinion.

Sedgwick & Power, for appellant.

France & Harlan, for appellee.

REESE, Ch. J.: This action was instituted in the District Court of York county, and was for an injunction to restrain defendant from interfering with the telephone system of the plaintiff in the city of York. A trial was had to the District Court, which resulted in findings and a decree in favor of plaintiff in part, and of defendant in part, which is hereinafter set out at length.

It was alleged in the amended petition of plaintiff that plaintiff was incorporated under the laws of this State, and was doing a general telephone business in the various cities thereof, and that by an ordinance of the city of York, which is set out in full in the petition, the plaintiff was authorized to construct and operate its telephone system in the said city, and had, before the institution of this action, commenced the construction and operation of such system therein, connecting its system in the city of York with its general telephone system throughout the State; that the defendant had been authorized by an ordinance to construct an electric light and power system in the city of York, and that it had commenced constructing the same; that in carrying on said business defendant used lines of wire for the purpose of conducting electricity, and that it was using, and contemplated using, wires for conducting electricity for the purpose of furnishing incandescent light to its patrons and the public, and wires for the conducting of electricity for furnishing arc lights for the use of its patrons and the public, and also for the purpose of furnishing power to its patrons and the public, to be used and applied in propelling machinery, and for other purposes; that in conducting electricity for the purpose of supplying incandescent light a large quantity and force of electricity was and would be necessarily used, much larger in quantity and power than the current of electricity necessarily conducted over the lines of wires of plaintiff in the transaction of its telephone business, and, in the conduction of electricity for the purpose of supplying arc light, a still larger quantity and

power of electricity was and would be necessarily conducted over the said wires of defendant than the quantity and intensity of electricity used in supplying the incandescent light; that the wires charged with the amount of electricity necessary for supplying the incandescent light, when placed parallel with the wires of plaintiff, by reason of the incandescent light wires carrying a larger quantity and force of electricity, would greatly interfere with the use and operation of the wires of plaintiff in the transaction of its business—so much so that it would be impossible for it to carry on its business successfully if the wires carrying electricity for the purpose of supplying incandescent light were used and operated parallel with the wires of plaintiff, and at a less distance than three feet from its wires, even when the incandescent light wires were most cautiously and carefully operated. And even when the natural conditions were the most favorable for such operation of the incandescent light, and under circumstances that, from the nature of the business of supplying electricity for lighting purposes were liable at any time to occur, even with the most careful management, the current of electricity for supplying the incandescent light, if from wires parallel with the wires of plaintiff, even at a greater distance than three feet, would interfere with and wholly prevent the operation and use of the line of wires of plaintiff; that the wires of defendant, placed and operated for the purpose of supplying electricity for arc light, would, when charged with electricity for the purpose for which they were intended and erected, and when running parallel with the wires of the plaintiff, if they were placed and so used within a less distance than 10 feet of the wires of plaintiff, interfere with and wholly prevent the operation of wires of plaintiff in the transaction of its telephone business. And the wires for supplying electricity for arc light would, when charged with electricity for the purpose for which they were intended, and when crossing the wires of plaintiff, if they were placed and so used at a less distance than ten feet from the wires of plaintiff, inter-

fere with the proper operation of its wires; and, from the liability of the wires to come in contact with the wires of plaintiff, there would be great danger of accident, not only to the property of plaintiff, but the property of others, unless the arc light wires of defendant were securely inclosed in good boxing, so as to prevent the possibility of the wires coming in contact with the wires of plaintiff. And, if the arc light wires so crossing the wires of plaintiff were placed at a less distance than five feet from the wires of the plaintiff, they would greatly interfere with the proper operation of its wires. That the wires of defendant, placed and used for the purpose of conducting electricity for the purpose of power, would have greater force and effect, and interfere with the operation of plaintiff's wires, when running parallel therewith, or when crossing the same, than the wires charged with electricity for the purpose of supplying the incandescent or arc light; and if any of the wires of defendant were placed parallel with the wires of plaintiff, and on the same side of the street or alley of the poles and wires of plaintiff, and were used for the purpose of conducting the electricity for incandescent or arc light, or for power purposes, by reason of the wires of plaintiff becoming loose or misplaced by accident or other cause, the wires of plaintiff coming in contact with the wires of defendant, the current of electricity being conducted over said wires of defendant, and being transmitted thereby to the wires of plaintiff, and by reason of other circumstances and conditions necessarily arising, and that would necessarily arise in the carrying on of the business, there would be continual danger, and liability of danger and destruction, of the instruments and appliances and the property of plaintiff, and of the property of other persons adjacent to the wires so placed and operated. That at the time of the commencement of the action, and after plaintiff had chosen its site for the erection of its poles and wires, and had occupied the same upon the several streets and avenues of the city with its poles and wires, and had placed its wires and instruments, and made its preparations to build its said

system of telephone communication, defendant, by its agents and employees, placed certain poles and wires, for the purpose and intention of using the same for the conduction of electricity for supplying incandescent lights and arc lights, and for power purposes, on the said street, and upon the same side of the street, so occupied by plaintiff, and along the side of, and over and below and against and among the poles and wires of plaintiff, and threatened and was about to place its poles upon the same side of the street occupied by plaintiff, and to place its wires thereon under and along the side of, and over, against and among the wires of the plaintiff, and threatened to, and unless restrained by the order of the court would, operate its system of electric lighting by supplying the incandescent and arc lights by an electric current, and also employ electricity for power purposes over and upon the said poles and wires, and upon the same side of the streets and avenues, and along and among the wires of plaintiff; and that if defendant was allowed to place its poles and wires as aforesaid, and to operate its system of electric lighting and of electricity for power purposes, or either or any of them, over its said poles and wires so placed, or was allowed to place and operate its wires upon the same side of the street parallel with the wires of plaintiff, or was allowed to place and operate its wires at a less distance than ten feet from the wires of the plaintiff, and parallel thereto, or was allowed to place and operate its wires, or any of them, across the wires of the plaintiff at a less angle than 45 degrees with the wires of plaintiff, or across the wires of plaintiff at a less distance than five feet from the wires of plaintiff, it would destroy or render valueless plaintiff's poles, wires, and system of telephone in the city of York, and render the same and the property and franchise of plaintiff, of no value whatever, and would greatly injure the operation of the plaintiff's system of telephones in other towns and cities in connection with the said system of telephones in the city of York, and would cause great and irreparable injury, etc.

An order of injunction was prayed for, restraining de-

fendant, its agents and employees, from proceeding with the poles and wires and other property of plaintiff, as well as its franchise, and from erecting or maintaining or using its wires or conductors of electricity upon the same side of any street previously occupied by the poles and wires of plaintiff, and from erecting or maintaining or using its wires, or any wires or conductors of electricity, parallel with the wires of plaintiff, within a distance of ten feet from its wires erected or to be placed upon its poles, and from so placing its wires or using the same so as to make it interfere by induction, contact, or otherwise, with the completion or operation of plaintiff's system of telephonic communication.

The defendant answered, setting up its authority from the city of York to erect its electric light and power system in the city, and that it had commenced the erection of its system, and admitting that it was incorporated for the purpose of furnishing electricity for the purposes named. It was alleged that long prior to the time that plaintiff commenced the erection of its poles with its system of wires thereon in the city, and long prior to the time it commenced the erection of any poles with system of wires thereon for the purpose of connecting any other towns or cities with telephonic communication with York, or for any other purpose whatever, or having spent any money whatever therefor, that plaintiff had full knowledge of the franchise allowed by the mayor and councilmen of the city of York, and of the ordinance mentioned in its petition, granting to the defendant rights and privileges as an electric light and power company; that plaintiff had full knowledge that defendant had erected and constructed an electric light station and an electric light plant at a cost of \$6,000 in the city, and that it occupied with its poles and wires, necessarily used in the operation of its light, certain streets, alleys, avenues and public grounds of the city, and certain streets named in the answer, to wit, Lincoln and Grant avenues, and Fifth and Sixth streets; and also that defendant had a contract with a large number of citizens,

residents of the city of York, and with the city itself, to furnish and place in their respective places of business, and had places designated for arc and incandescent lights, and to furnish electricity for lighting the residences and places of business, as well as public grounds, in pursuance of said contract, and that it was authorized to place many other lights in the city under new contracts, as well as in the carrying out of the contract already made; that long prior to the placing of any poles, wires, or other appurtenances for telephonic purposes in said city by plaintiff, plaintiff informed defendant and the city council of the city of York, and other citizens, that defendant's electric light system, or the franchise granted defendant by said ordinance, would not and could not interfere with plaintiff's telephone system, and that plaintiff intended to put up, and would put up, poles around the public square in the city, 45 feet in length; and on Lincoln and Grant avenues, and on Fifth and Sixth streets, and all business parts of said city, it intended to and would put up poles 42 feet in length, and place wires thereon not less than 30 feet from the ground. The answer also contained a general denial of all the allegations contained in the petition not admitted.

To this answer plaintiff filed a reply, admitting the passage of the ordinance authorizing the defendant to erect his electric light and power system, and that the defendant had constructed and erected an electric light station and an electric light plant, and had erected certain poles and wires and appurtenances for the operation of electric light in the city of York; but denied that the defendant had ever lawfully occupied any part of the streets named prior to the commencement of the action except as it had erected and placed its poles and wires against and among the poles and wires of plaintiff, before that time erected and placed by it as set forth in the petition. It was further admitted that the plaintiff had knowledge of the fact of the ordinance referred to prior to the erection and completion of its telephone system, but denied that it had any knowledge of any occupation on the part of defendant of any of the

streets named, or any part thereof, prior to the commencement of the suit, except as was fully set forth in the petition.

The plaintiff also denied that it had ever informed defendant, or any other person, that defendant's electric light wires would not and could not interfere with plaintiff's telephone system, or that plaintiff intended to put up, or would put up, poles around the public square and along the streets named, of the length named, or that plaintiff intended to or would put up its wires not less than thirty feet from the ground. The reply also contained a general denial of all the allegations of the answer not admitted. The findings and decree of the District Court were as follows :

"(1) That the plaintiff and defendant are corporations, duly incorporated under the laws of the State of Nebraska.

"(2) That on the 19th day of September, 1887, the mayor and city council of the city of York, Nebraska, duly passed the ordinance set forth in the defendant's answer, which ordinance was duly approved by the mayor of said city, and was published as required by law. That said ordinance authorized the defendant to construct and maintain an electric light power or gas plant, or both, in said city, and to that end authorized said defendant to use any of the streets, avenues, alleys, bridges, sidewalks or public grounds of said city for the purpose of making necessary excavations, or erecting poles, posts or wire therein. Said ordinance requires all poles carrying wires shall reach at least eighteen feet above ground.

"(3) That on the 7th day of November, 1887, the mayor and said city council of the city of York passed the ordinance set forth in the plaintiff's amended petition, which ordinance was duly approved by the mayor of said city, and was published as required by law. That said ordinance granted to the plaintiff the right of way for the erection and maintaining of poles and wires, with all the appurtenances thereto, for the purpose of transacting a general telephone and telegraph business through, upon

and over the streets, alleys and public grounds of the said city of York.

"(4) That in pursuance of said ordinance, set forth in defendant's answer, the defendant, prior to November 7, 1887, had constructed and erected its electric light station and electric light plant at the cost of about \$6,000, and had occupied with its poles, wires and appurtenances necessarily used in the operation of its electric light some of the streets and alleys of said city, prior to the erection of any poles or wires by the plaintiff in said city. That said plant, so put in by the defendant, was for the purpose of both arc and incandescent systems of lighting by electricity. That prior to the commencement of this action the said defendant had erected its poles and wires along the east side of a portion of Lincoln avenue and Grant avenue, and along the south side of a portion of Fifth street, and the north side of a portion of Sixth street, of said city, for the purpose of carrying on its said business of electric lighting. That at the time the said defendant erected its poles upon the aforesaid streets and avenues, the officers and employees of the plaintiff had full knowledge thereof, and made no objection thereto. That prior to the erection of the poles by the defendant the superintendent of construction of the plaintiff company stated to the manager of the defendant company that the same would not interfere with plaintiff's telephone system, and that the officers of the plaintiff company stated to the officers of the defendant company, before the defendant had erected any poles, that the plaintiff company would erect 45-foot poles in the business part of said city of York, where it should erect its poles.

"The court finds that each side of the public square or court house square of said city is a portion of the business part of said city ; that the plaintiff has erected on the south side and west side of said square 45-foot poles, and on the east and north sides poles of thirty feet in length.

"The court finds that the defendant occupied the north side of Sixth street with its poles prior to the occupancy

thereof by the plaintiff. That the plaintiff occupied Fifth street and Grant avenue prior to the occupancy thereof by the defendant. That prior to the commencement of this action the defendant was proceeding to extend and complete its said system of poles and wires through the city of York, and in many places running parallel to the poles and wires of the plaintiff on the same side of the street.

“(5) That prior and at the time of the commencement of this action the plaintiff had erected, and was maintaining, a system of lines and telephones in at least forty of the towns and cities of the State of Nebraska, and between and connecting the said towns and cities of the State of Nebraska, and between and connecting the said towns and cities in which they were so operating, for the purpose of supplying its patrons and the public with a means of communication from point to point in said cities and towns, and also between said towns and cities, by the use of electricity upon said wires, operating telephone instruments and other apparatus. That at the commencement of this action the plaintiff had erected, and was maintaining and operating, a line of its said poles and wires from said city of York, connecting with the other towns and cities of its said system of telephonic connection, and had, in connection with its said systems, erected and placed poles and wires upon the west side of a portion of Lincoln avenue, upon the east side of a portion of Grant avenue, upon the south side of a portion of Fifth street, and upon the north side of a portion of Sixth street of said city, had located its central office on the south side of the public square of said city of York, and was proceeding further to extend and complete its system in the city of York, and, in pursuance of contracts made with various citizens in the city of York, the plaintiff had placed certain of its telephone instruments in the offices and residences of many of the citizens of York, and which said instruments were connected with other, and said system in said city was in operation for telephonic communication.

“(6) The court further finds that it will be of great and

irreparable injury and damage to the business of the plaintiff and its property, telephone instruments, apparatus and appliances, and will be dangerous to the lives and property of the public, and will be dangerous to the patrons of the plaintiff as well as to the public, and will greatly interfere with the use and operation of the wires of the plaintiff, for the defendant to use a wire or wires running parallel with the wires of the plaintiff, and on the same side of the street with the telephone wires in the use of the plaintiff, for the purpose of conducting electricity for arc lighting.

"The court further finds that the wires of the incandescent system of lighting, used by the defendant, when run on the same side of the street as the telephone wires in use, and parallel therewith, at a less distance from the said telephone wires than eight feet, and for a greater distance than 300 feet, will greatly interfere with the use and operation of the wires of the plaintiff, and will cause plaintiff great and irreparable injury, as well as damage to both life and property.

"(7) The court finds that the defendant had the prior occupancy of the north side of Sixth street, west from Grant avenue to the first alley west of Lincoln avenue, and had the right to use said street with its poles and wires for both arc and incandescent lighting, without molestation and interference on the part of the plaintiff.

"(8) The court further finds that it will cause plaintiff great and irreparable injury, and will be dangerous to both life and property, for telephone and electric light wires to cross each other at a less angle than 45 degrees, or nearer to each other than five feet, unless the wires of the system are boxed with wooden boxes, or a strong iron guard wire is suspended midway between the two systems, so that the wires of the upper system will not fall upon the lower.

"(9) The court further finds that the plaintiff insists upon the use and occupancy of the said north side of Sixth street with its poles and wires, and that the defendant has no right to use the same with its poles and wires, and that the plaintiff insists and claims that the defendant shall not

occupy with its poles and wires the same side of the streets that the plaintiff uses and occupies with its poles and wires. That the defendant insists that it has a right to, and threatens to, place its poles and wires upon the same side of the street, and along and parallel with the wires and poles of the plaintiff, and in close proximity thereto.

"(10) The court further finds that the defendant can run its wires for incandescent lighting on the same side of the street of, and parallel with, the telephone wires when not nearer than eight feet from the other, or for a distance of not exceeding 300 feet, without injury to the plaintiff, provided a strong iron guard wire is suspended at least every 100 feet, and midway between the two systems, so as to prevent the upper wire from falling upon the lower.

"(11) The court further finds that the greatest number of plaintiff's wires, and on account of the manner in which said plaintiff's system in York was planned, laid out and erected, the bulk of its business will be done over the wires and poles placed on the south and west sides of the public square. That but few of its wires are placed on the north side and east side of the square, and that the said system was planned by the plaintiff with a view of not placing many wires on its poles on the said east and north sides. The court finds that the plaintiff placed thirty-foot instead of forty-foot poles on the east side and north side of said square (the same being a portion of the business part of said city of York), for the purpose of preventing the defendant from using its poles and wires on said east and north sides of the square, the defendant's poles being twenty-five feet in length before being set.

"It is therefore ordered, considered, adjudged and decreed by the court that the defendant has the right to use its poles and arc and incandescent wires for electric lighting on the north side of Sixth street, between Grant avenue and the first alley west of Lincoln avenue, without let or hindrance on the part of the plaintiff, its agents, employees or servants, and also the defendant has the right to use its poles and incandescent wires for incandescent lighting on

the east side of Grant avenue, from Fifth street to Sixth street, and on the south side of Fifth street, from Grant avenue to Lincoln avenue, when said wires are not more than twenty-two feet from the ground, without interference on the part of the plaintiff, or its agents, employees or servants.

"It is further adjudged and decreed, with the above exceptions, that the defendant, its agents, servants and employees are perpetually enjoined from using for are lighting purposes any wires running parallel with, and on the same side of the street with, a telephone wire of the plaintiff, and the said defendant, its agents, servants and employees are also perpetually enjoined (with the exceptions above stated) from using for incandescent lighting purposes any wire which runs parallel with any telephone wire of the plaintiff, on the same side of the street, which is less than eight feet from such telephone wire, nor in any case for more than 300 feet, and not in that case unless a strong iron guard wire is suspended every 100 feet, and midway between the said telephone and electric wires, so as to prevent the upper wires from falling on the lower.

"It is further ordered, adjudged and decreed that the defendant, its agents, servants and employees are perpetually enjoined from using any electric light wire which the defendant has already strung, or shall hereafter string, across any telephone wire of the plaintiff, unless said wires cross at an angle of at least forty-five degrees and at least five feet apart, and not in that case unless the wires of one system are boxed in wooden boxes, or a strong iron guard wire is suspended midway between the two systems, so as to prevent the wires of the upper system from falling upon that of the lower.

"It is further ordered, adjudged and decreed that where or the wires of the one system already cross that of the other, where the wires of the one system shall hereafter be constructed across that of the other, it shall be the duty of the company that cross, or shall hereafter cross, the wires of the other company to construct the boxes or guard wires

aforesaid, and for that purpose shall have the right to use the poles of either company.

"It is further ordered, adjudged and decreed that the plaintiff, its agents, servants and employees, be perpetually enjoined from constructing or using any telephone wire parallel and within eight feet of any electric light wire of the defendant. And it is further ordered that this decree shall take effect and be in force from and after the 5th day of March, A. D. 1888, and each party pay its own costs."

From this decree plaintiff appeals. It is now contended by plaintiff that the nature of the two systems is such that they cannot be successfully and safely operated near together, nor on the same side of the street, excepting in a very limited manner, and for a very short distance, and that with the greatest precaution. It is contended that the District Court erred in decreeing defendant any affirmative relief; also, that some of the findings of the District Court were not supported by the evidence; that some of the findings are inconsistent with each other, and, lastly, that the decree is in many respects inconsistent with the findings.

From a careful examination of the pleadings and evidence in the case we are persuaded that the first contention of appellant is well founded. We are unable to find anything in the answer of defendant demanding or entitling it to affirmative relief. In addition to this, the evidence submitted to the trial court shows that it does not need, and is not entitled to, any protection from the telephone system of plaintiff. We are unable to find any proof that the proximity of the plaintiff's wires to those of defendant will render defendant's service any less effective than were they more remote, as it seems to be pretty clearly shown by the evidence that plaintiff would be the only sufferer by the transmission of electricity from defendant's system to that of plaintiff, the electrical force used by defendant being so much greater than that of plaintiff. There is much said in the testimony about injury to persons and property from the wires of the two systems coming in contact by falling one upon the other, but of this we presume the muni-

cipal authorities of the city of York will have complete control, in the exercise of the police powers granted to it for the protection of life and property upon the street and within its jurisdiction. So much of the decree, therefore, as enjoins plaintiff and its agents and servants from constructing or using any telephone wire parallel to, and within eight feet of, any electric light wire of defendant will be vacated, and the decree to that extent modified, as not properly in the case submitted to the court upon the pleadings and evidence.

The real contest in this case is as to the right to occupy the streets on the north, south and east sides of the public square, which is upon the north side of Sixth street, between Lincoln avenue and Grant avenue, on the east side of Grant avenue between Fifth and Sixth streets, and on the south side of Fifth street between Grant and Lincoln avenues, and therefore it is not deemed necessary to notice here all the questions presented and discussed in the very able briefs and oral arguments submitted by the attorneys for either side.

It may be observed, as shown in the findings and decree, that the ordinance under which defendant was given the right to occupy the streets and public grounds of the city was passed on the 19th day of September, 1887, and that under which plaintiff obtained its right was passed on the 7th of the following November, thus, in point of time, giving to defendant the first authority to occupy the streets and public grounds, but of course, not to the exclusion of plaintiff; that in pursuance of the ordinance passed in September, and prior to the time of the passage of the ordinance under which plaintiff asserts its right to occupy the streets and public grounds of the city, defendant had constructed and erected its electric light station and plant at a cost of about \$6,000, and prior to the erection of any poles or wires by defendant, had occupied with its poles and wires some of the streets and alleys of the city; and in this connection it may be noticed that one of the findings of the District Court is to the effect that, at the time of the

erection of its poles and wires by defendant, plaintiff and its officers had full knowledge of the fact and made no objection thereto. The proof shows that the building and machinery, constructed by defendant prior to the taking of any action by plaintiff toward the erection of its poles and wires, were placed on the alley west of Lincoln avenue, running north and south, and nearly one block north of Sixth street, which is the northern boundary of the public square, and that it constructed a line of poles thence south along the alley to a point opposite the south side of the square, or on Fifth street, and that upon the pole on the north side of Sixth street — but within the street — a cross-arm was placed facing to the east along the north side of said Sixth street, and, in addition thereto, a pole was set on the north side of that street, at the west side of Lincoln avenue, which indicated a purpose to run east along the north side of the square to Grant avenue, and that at the time of the erection of this last pole plaintiff's poles had been laid along the north side of the square in Sixth street, and on the east side of the square in Grant avenue, but had not been set up. We think it is also sufficiently established that at or prior to this time the officers and agents of the parties had a conference upon the subject of the occupancy of the streets, when it was said by the representatives of the plaintiff that there would be no conflict; that plaintiff would place its wires upon poles of such length as would enable defendant to erect its poles and wires the height prescribed by ordinance, upon the same side of the street, without injury to the use of plaintiff's wires; but that when defendant's servants were erecting its lines from the alley to Lincoln avenue, a force of men was put to digging holes on the north and east sides of the square, and placing the poles therein, and at the noon hour which immediately followed, the poles were set up and a wire placed thereon so low that defendant could not place its wires without interference; but that defendant, during the afternoon, erected its poles and placed a wire thereon which extended some two feet above the wire of plaintiff,

and at about that time this action was instituted by plaintiff. It is also pretty clearly shown that plaintiff's superintendent had, prior to this time, represented that the poles to be erected by him within the business part of the city would be at least forty feet long, but that those actually erected were much shorter, and that, after plaintiff's agents and officers had induced the agents and officers of defendant to believe that there would be no objection to the occupancy of the same side of the street by both parties, under the arrangement made between them, plaintiff's agents and officers so far changed their minds as to conclude that they would so occupy the street as to prevent its occupancy by defendant; and in this there is shown something of a want of good faith on the part of plaintiff's officers and agents. But it is contended that the finding of the court that defendant first occupied the east and south sides of the public square is entirely unsupported by the evidence, since it was shown by substantially all of the witnesses that the poles of plaintiff were distributed along the streets some four days prior to the erection of the defendant's poles and wires. While it is true that the proof shows these facts, yet, for the purpose of examining this finding, the whole of this part of the case must be considered. As we have said, defendant had constructed its building and placed its machinery therein, and had commenced the construction of a line of wires prior to the construction by plaintiff of its system. If defendant's witnesses are to be believed—and they must, in support of the decree—a mutual understanding existed between the officers and agents of the two companies, by which it was fully understood that defendant had already entered upon the construction of that part of its system which was to occupy the ground in dispute. In violation of the representation made to the citizens of the city, as well as to the officers and agents of defendants, that poles forty feet in length would be used, plaintiff caused poles thirty-five feet in length to be scattered along the street. This was observed by one of the agents of defendant, but relying on the representation

formerly made to him and others, he supposed that a mistake had been made in placing the poles of that length upon the ground, and that they would be removed, and the agreement carried out. At this time, as we have said, defendant had entered upon the construction of the line of wire, and was not aware of plaintiff's purpose until a large number of men had commenced digging holes for the erection of plaintiff's lines upon the poles which the plaintiff had repeatedly agreed should not be used, and this, in part, at an hour in the day when labor was usually suspended. During the afternoon defendant proceeded to place its wires on the line in accordance with the ordinance and the previous agreement of the parties.

We are quite certain that plaintiff cannot well deny the correctness of this finding ; but it is insisted in this connection that defendant cannot insist that plaintiff was estopped by anything its officers or agents had said or done previous to the commencement of the action, for the reason that no estoppel was pleaded in the answer. While this is true, as a general rule, yet we know of no rule of equity which will permit a plaintiff to mislead a defendant by representations which he does not propose to carry out, and then go into equity for the purpose of enjoining such defendant from acting in accordance with the previous arrangement, and then insist that plaintiff's failure must be pleaded as estoppel. We apprehend that quite the reverse is the rule in cases of this kind. If plaintiff and defendant had entered upon an agreement upon which the defendant relied, plaintiff cannot enjoin defendant from living up to such an agreement, upon the ground that it was not pleaded as an estoppel. While defendant might not be entitled to any affirmative relief growing out of such conditions, without alleging the facts, it is quite clear that its failure to plead the estoppel would not entitle plaintiff to equitable relief, which it would not be otherwise entitled to in an action instituted by itself.

But it is insisted that it is impossible to comply with the provisions of the decree, for the reason that, by it, defend-

ant is permitted to establish and operate its lines along the north, east and south sides of the public square, which it is said in the brief is 600 feet upon a side, while at the same time the court enjoined the defendant from operating its system of wires along and parallel to the plaintiff's wires for more than 300 feet. While we are unable to find anything in the evidence which gives the distances upon the sides of the square, yet we apprehend that the plaintiff cannot, for this reason, complain of the decree. The decree is entirely consistent with itself. By it, defendant, having first occupied the north, east and south sides of the public square, is entitled to such occupancy without reference to any claims of right which plaintiff may have. But in other portions of the city where plaintiff's and defendant's lines come in contact, defendant is not permitted to erect and use its lines so as to run parallel with the lines of plaintiff for a greater distance than 300 feet, and then only when properly protected by guard wires.

The provision of the decree in this respect can have no reference to that part which confers upon defendant the right to the occupancy of the streets named. If plaintiff can so adjust its wires upon the north, east and south sides of the public square as to render its system in that portion useful by any kind of protection which it may devise, there is no legal objection to its occupying the part of the street named in the decree, to wit, the north, east and south sides of the public square, either by the erection of poles of sufficient height to protect the wires from the influence of defendant's wires, or by any other method which it may adopt, so long as it does not interfere with the right of defendant to use and exercise its own franchise. We see nothing in the case by which defendant could complain if plaintiff should construct its wires upon the same side of the street, and immediately over or under those of defendant, for defendant's wires could not suffer by reason of proximity to those of plaintiff.

It would seem from the evidence, that plaintiff might make use of the side of the street named by the construc-

tion of a system of wires on poles more than forty feet high, and in such case defendant could not complain; but of this, of course, defendant must judge for itself. The decree in this particular is right.

Subject to the modification hereinbefore referred to, the decree of the District Court is affirmed.

JUDGMENT ACCORDINGLY.

The other judges concur.

NOTE.—See note to *Cincinnati Inclined Pl. Ry. Co. v. City, etc., Am., post.*

WISCONSIN TELEPHONE COMPANY V. EAU CLAIRE STREET RAILWAY AND THE SPRAGUE ELECTRIC RAILWAY AND MOTOR COMPANY.

Wisconsin Supreme Court, Jan. 29, 1890.

(From Appeal Book).*

INTERFERENCE OF ELECTRIC CURRENTS.—INJUNCTION.

The principal use of streets is to accommodate the traveling public, and whatever rights telephone companies have to maintain their lines in streets are in subordination to the right of travel.

This principle applies not only to modes of travel in use when the rights of the telephone company were acquired, but also to new modes invented or applied generally in aid of travel.

Application for injunction at suit of telephone company to restrain an electric light company from operating its road so as to interfere, by its strong currents of electricity, with the use of the telephone system, denied, it appearing that the single trolley system used by the railroad company was the best system known, while the telephone company could avoid injury to itself by adopting the metallic circuit.

FACTS stated in opinion.

Miller, Noyes & Miller, for plaintiff.

*An appeal was taken, and the case printed, from which the opinion is copied, but an agreement was reached and the appeal was never argued.

H. H. Hayden, for defendants.

OPINION OF THE COURT: This is a motion for a temporary injunction to restrain the plaintiff from operating their electric railway in the streets of Eau Claire, for the reason, it is claimed, that the escape of electricity from the wires of defendant's road interferes with the successful operation of the telephones of the plaintiff. It is claimed by the plaintiff that the leakage of the electricity complained of is occasioned by the failure on the part of defendant to erect suitable wires for the return of the electricity, instead of allowing it to escape through the wheels of the car and thence return by the railroad track. The railroad in question was duly authorized by the city authorities, and has been in operation as a horse railway up to the present winter. The plaintiff company have operated their telephones within the city and along the streets, parallel with the street railway, for several years since 1882.

During the present winter the defendant company changed their power from animal power to electricity, and for three months past have been using the last named power.

The principal use of the street is to accommodate the traveling public, and whatever rights the telephone company have must be held to be in subordination to this right of travel. They must so conduct their business as not to interfere with ordinary travel and they must submit to any necessary inconvenience resulting from the ordinary travel passing over the street. They take their right subject to this burden. This principle applies not only to the mode of travel at the time the telephone was built and their rights acquired, but applies as well to any new or improved modes of travel which have been or may hereafter be invented and applied generally in aid of travel on the public streets.

But the plaintiff company has the right to demand that those passing along the streets, either with vehicles or with electric cars or any other mode of travel, shall exercise reasonable care. They must be guilty of no negligence; they

must adopt all the usual, reasonable and necessary safeguards to prevent accident or injury to the property or rights of others. If they do this, and, notwithstanding such care, the plaintiff is subjected to inconvenience, it must be borne by it. The evidence in this case satisfies me that the defendant has been guilty of no negligence, either in the building or operation of its road.

The system adopted by the defendant is one in common use. The evidence clearly shows that what is known as the single trolley system, by which the electricity returns by way of the wheels of the car and the track, is now used by nine-tenths of the roads in operation in the United States; that the double trolley roads, which adopt the plan of the return wire, have in some instances been built; but the evidence of all the experts is to the effect that they are practical failures; and the evidence fails to show that any scheme has been invented which is practicable and can be made a success except the system adopted by the defendant in this case, that is, the single trolley system.

Hence it follows that they have been guilty of no negligence, and as it is further true that the system adopted is substantially the only one upon which roads can be operated successfully, it follows that the prayer of the complaint asking for an injunction to restrain the running of the road as it is, is, in effect, asking for the entire cessation of the use of the defendant's road, as an electric road; I am not prepared to do that.

The defendant has been subjected to considerable expense and has just got the road in successful operation without any objection, as the evidence shows, on the part of the plaintiff company, and it would be a hardship now, and virtually destroy their property, to grant the injunction prayed for.

On the other hand, if I deny the motion, the telephone company can continue the use of their lines. This is amply proved by the undisputed evidence of the experts in this case. It appears beyond question that a way has been contrived by which, by means of a return wire forming a

metallic circuit, they can operate their plant successfully without injury from the escape of the electricity complained of. With them it is not a question of total suspension of business, but simply a question of expense of alteration, and so far as the evidence appears, I should conclude that the expense would not be a very considerable amount. Hence the injury complained of is not irreparable or continuous. When the improvement is made, the trouble complained of will cease, and the plaintiff, if it should be found that this expense so incurred was made necessary by the wrongful act of this defendant, could sue the defendant at law and recover whatever expense was incurred in making the change. I therefore think that if the plaintiff has suffered any injury by the acts of the defendant in building or operating their road, it has a complete remedy at law.

The plaintiff claims that it is entitled to this injunction under chapter 375 of the laws of Wisconsin for the year 1889. Sections one and two of this chapter read as follows:

Section 1. It shall be the duty of each and every electric light and power company and of each and every person engaged in the transmission of electrical energy within this State to provide by suitable insulation, return wires or other means against injury to persons or property, by leakage, escape or induction of any and every current of electricity.

Sec. 2. Neglect of any of the above provisions shall entitle the person or corporation injured thereby to a preliminary injunction preventing further use of such current until said section 1 has been complied with.

It appears to me that the language of this statute is broad enough to cover the case of the plaintiff as well as that of the defendant. The object of that statute is to prevent leakage of electric wires premeating the earth and causing damage to others, and by its terms as clearly forbids the plaintiff from allowing the electricity to escape into the ground as it does the defendant, and hence, if I am right in this, it follows that even if the defendant was in the wrong in not providing for a safe return of the electricity, that the plaintiff is just as clearly in like position, differing only in the amount of electricity that is allowed to escape.

And the evidence in this case shows that, but for the unlawful act of the plaintiff in using the ground for a return circuit, contrary to the provisions of the statute, no serious inconvenience would result from the proximity of the defendant's wires, and the plaintiff, being in the wrong, and suffering damage, in part, at least, by reason of its own wrongful act, is not entitled to an injunction.

NOTE.—See note to *Cincinnati Inclined Plane Ry. Co. v. City, &c. Am.*, *post*.

HUDSON RIVER TELEPHONE COMPANY, Respondent, v.
THE WATERVLIET TURNPIKE AND RAILROAD COMPANY,
Appellant.

New York Supreme Court, General Term, Third Department, Feb., 1890.

(56 Hun, 67.)

WIRES IN STREETS.—INTERFERENCE.—INJUNCTION.

A statute enacted in 1862 authorized a turnpike company to operate a street railway, using "any mechanical or other power—except the force of steam." Held, to warrant the use of electricity, although such use of the agent was unknown in 1862.

Upon an application to continue an injunction, at suit of a telephone company, restraining the maintenance of wires for an electric railway, upon the ground of interference by induction and conduction, it appearing that the most feasible remedy would be the use of the metallic circuit by the plaintiff, but it being impossible to determine upon the motion at whose expense the metallic circuit should be established, ordered, that the injunction should be continued thirty days, or until the defendant should make certain specified stipulations.

APPEAL from order of Special Term restraining the defendant from operating its electric railroad by the single trolley or single wire system, between certain points in the city of Albany, until the final determination of an action

Telephone Co. v. Railway Co.

brought for a permanent injunction to restrain such operation throughout the city of Albany. The telephone company was first in the field, engaged in furnishing telephone service before the introduction of electric motors upon the defendant's road. The ground of action was that the operation of the single trolley system by the defendant would render it impossible for the plaintiff to conduct its business without an entire change of its plant, system and mode of operation.

Matthew Hale, John S. Wise and L. G. Hun, for appellant.

D. C. Herrick, for respondent.

LANDON, J.: It appears that the plaintiff is lawfully incorporated as a telephone company, and is lawfully in possession of its lines, poles, stations and apparatus, and that it lawfully operates the same.

The defendant was incorporated in 1828 as a turnpike company, and by chapter 233, laws 1862, it was authorized to operate a street railroad. The plaintiff challenges the right of the defendant to use electricity as its motive power. The act in question authorized the defendant to use "the power of horses, animals or any mechanical or other power, or the combination of them, which the said company may choose to employ, except the force of steam." The plaintiff basis its challenge upon the fact that in 1862 electricity as a propellor of railway cars was unknown, and hence not within the intention of the Legislature. But the legislators of that day were not ignorant of the inventive and experimental activity of the age, and had they intended to grant the defendant the right to use any power except steam, which subsequent invention or experiment might demonstrate to be most beneficial to the company and to the public, the language employed would have been apt for the purpose. We therefore think the terms and intent of the act embrace electricity as a

motive power. By the grant of the State the plaintiff lawfully uses electricity for telephonic purposes, and the defendant lawfully uses it for railway propulsion, and each company has its respective rights and privileges along the same streets and highways. As the public grant vests in each company franchises and privileges for unlike occupations, the grant to one is not necessarily repugnant to the grant to the other, nor in derogation of it, unless it is impossible for the one to co-exist upon the same streets and highways with the other. The grant of public franchises and privileges by the State is strictly construed, and hence, as between claimants under different grants, unless more is expressly granted, no more passes than is reasonably necessary for the beneficial enjoyment of the grant. *People, ex rel. Third Ave. R. R. Co. v. Newton*, 112 N. Y. 396. The claim of exclusive privileges will not be allowed when not expressly conferred. *Syracuse Water Co. v. City of Syracuse*, 26 N. Y. St. Rep. 364. The grant of franchises and privileges is unlike a grant of land. The grantee of land is vested with exclusive dominion, and whoever, without permission, injuriously invades it, whether by personal entry, by polluted waters or noxious vapors, infringes upon the owner's rights. To the extent that there is here a grant of the use of land as space on the surface, or above or beneath it, having measurable dimensions, the grant to the telephone company may be likened to a grant of land, and the defendant may not exclude it from that space, though it might be competent for the court to readjust the occupancy so as to afford mutual accommodation. Thus one may, by municipal permission, lay his gas, water or sewer pipes beneath the surface of the street. A railway company may subsequently be granted the privilege to lay its tracks upon the same streets, subject to the proper readjustment of the gas, water and sewer pipes, and the owner of the latter has no vested right to prevent such readjustment. No complaint is here made as to any visible invasion of the plaintiff's defined or enclosed field of space. The plaintiff alleges an invasion of its electrical field, or rather that the

defendant extends its electrical field so as to include or co-occupy that of the plaintiff. Unlike fields of land, these electrical fields are not definitely measurable. They extend into the regions above and below the surface of the earth, but to what extent, or how constant or variable, the president of the plaintiff, in his affidavit, declares that he "is entirely unable to state."

It is obvious that the rules applicable to a definite acreage of land may not be applicable here. The grant to each company is to employ upon the same street the invisible energies of nature; and, since it is in vain to define the fields that confine them, we are perforce constrained to seek for methods which will neutralize or reduce to a minimum the injurious effects of their contact or interference with each other. That method, it seems to be conceded, exists in a device for a metallic circuit for the return current of the electricity. The earth completes with the outgoing wires a natural return circuit for the electricity sent forth upon the wires from the generating stations; but, since the earth is common to both companies, and both cannot use it, but one company may safely use it, if the other will use an ærial metallic circuit, the problem seems to be which company, under the circumstances, ought to use the metallic circuit; and, if the plaintiff ought to use it, ought the defendant to pay the expense thereof wholly or in part?

The method which either party should employ for the return circuit for its current of electricity is not defined in the grant of its franchises, and therefore is not expressly, much less exclusively, bestowed. Neither company, therefore, has any exclusive privilege to use what is called the grounded or earth circuit. Both companies are granted privileges upon certain streets. The public motive inducing the respective grants was to promote the public welfare, and to enlarge the public benefits to be derived from the streets. It is plain that, if these grants can be so construed as to permit both companies to occupy the same streets beneficially to themselves and to the public, such construction should be adopted. To

accomplish this, each company should adopt, upon equitable terms, such reasonable methods and safeguards as shall most prevent interference with the other or injury to itself. Each grant, therefore, as against the necessary requirements of the other, has no greater extent than is reasonably necessary for its beneficial enjoyment. What is reasonably necessary must depend in some degree upon what is known to be the most approved available appliances both to avoid inflicting injury or receiving it between each other. The same rule which binds them to care to avoid injury to third persons binds them as to each other. Both companies can maintain and operate their respective plants upon the same streets, and each should do what is reasonably necessary to avoid interference with the other and to protect itself. The railroad company does not threaten to come into contact with the poles of the telephone company, nor with its wires, except as the greater volume of electricity employed by defendant may, by induction above ground and conduction under ground, disturb the proper and more delicate operation of the smaller volume of electricity employed by the plaintiff. If there were no reasonable and practicable method to obviate this interference, the defendant must needs desist from the use of electricity as a railway motive power upon the streets preoccupied by the plaintiff. This, for the reason that the privilege to operate the telephone beneficially, gives the real value to the established lines, and is valuable property. It cannot be presumed that the State intended to destroy or diminish this property, in the absence of an express revocation of chartered privileges. But as the plaintiff can be protected or can protect itself against the injurious effects of the electricity employed by the defendant, no necessity exists for denying the use of electricity to the defendant. Clearly, if there are two methods open to the plaintiff, one exclusive of the defendant and the other not, and both equally serviceable and practicable, the latter should be adopted. It remains to consider whether the railway company ought to do more or other-

wise than it has done to prevent electrical interference with the telephone company, and whether the telephone company can reasonably be required to adopt other and improved methods to protect itself from such electrical interference. Upon the evidence before us, it seems to be true that the single trolley system adopted by the railway company is the best now known, regard being had to mechanical, electrical and financial considerations, but without regard to electrical interference with the telephone, which uses the grounded or earth circuit instead of a metallic circuit. The plaintiff does not use the metallic circuit. It is much cheaper to construct the metallic circuit for the telephone than for the railway. It appears to be shown by the evidence that the metallic circuit, if employed by the telephone company, would obviate the electrical interference of which plaintiff complains. We should certainly in the interest of the public, as well as that of the railway company, permit the latter to construct its road upon the most approved system. Other methods for the protection of the telephone are suggested. But it does not appear that any other is equally effective to prevent disturbances. To construct the metallic circuit for the telephone would be expensive, but how expensive does not appear. Assuming, then, that the adoption of a metallic circuit for the telephone is the most reasonable method of obviating the injury from electrical interference, the question will arise whether the telephone or railway company ought to bear the expense. This is an equity action in which, upon the trial, the court will have jurisdiction to administer all the relief which the nature of the case and the facts demand, and to frame its judgment in such terms as shall compel obedience by both parties. Whoever seeks equity must do it, and hence the court, in its equitable mandate against the defendant, can impose equitable conditions upon the plaintiff. In one sense the injury complained of is neither irreparable nor necessarily continuous, since it can be removed by incurring the necessary expense. But, if the

plaintiff shall incur all the expense without compulsion or legal duress, it might be regarded as voluntarily incurring it, and hence could not recover it from defendants, and would suffer, to that extent, irreparable loss. The present methods of the plaintiff are all it requires if the defendant should not interpose its destructive agency. It may be that the defendants ought to bear the expense of a change of plan. That expense would be less, and the advantages to the defendant greater, than if it were compelled to adopt the double trolley system. It may be that plaintiff's obligation to maintain a metallic circuit after it shall have been established will be the proper measure of its share of the burden. It may also be that priority in time gives the better equity. The defendant may lawfully enter upon the street, but the condition may be implied that it shall also indemnify others already rightfully there against the additional expense which its entry subjects them to, as in the case of the gas, water and sewer pipes already referred to. But we cannot now well decide who will ultimately be liable for this expense, or whether equity requires its apportionment. This matter was less fully considered upon the argument than the electrical and other important features of this somewhat novel case.

We cannot place the burden of this expense in the first instance upon the defendant, since the plaintiff ought not to yield control of its lines to the defendant. The necessities of the case compel us to require the plaintiff to assume it, in order to protect itself against the defendant.

Ordered that the injunction be continued as follows for thirty days, and until the defendant shall stipulate:

1. That the court may determine on the trial what has been or what will be the necessary expense to the plaintiff of preventing, by metallic circuit or otherwise, the injury to, and interference with, the operation of their telephone, complained of in the complaint.

2. And that the court may further determine on the trial what damage, if any, plaintiff has sustained to its business, or will sustain, by reason of the matter set forth in the

complaint, before the same can be with reasonable care prevented as aforesaid.

3. And that in this action the court may adjudge to the plaintiff against the defendant such recovery for said expense and for said damages as may be just and equitable on the proof established at the trial.

And, further, until the defendant shall have given to the plaintiff a bond in the penal sum of ——— dollars, with two sufficient sureties duly acknowledged, said sureties to justify in the usual manner, conditioned that the defendant will pay to the plaintiff any sum or sums which may be adjudged against defendant in this action.

Upon the giving of said stipulation and bond the defendant may apply, on two days' notice, to any judge of the General Term for a certificate that said bond and stipulation have been duly given. On filing said certificate the injunction shall be raised.

Should the injunction be vacated as above provided, the plaintiff may, within thirty days thereafter (or such further time as may be granted by any justice), serve a supplementary complaint so as to seek the recovery of such expense and damage, or other or further relief, as it may be advised. No costs of this appeal; order to be settled.

LEARNED, P. J., concurred.

Injunction continued for thirty days, and until stipulation and bond as provided for in opinion; no costs; order to be settled by LEARNED, P. J., and LANDON, J., on two days' notice.

NOTE.— See note to next case. Also note to *Cincinnati Inclined Plane Ry. Co. v. City, &c. Assn., post.*

THE HUDSON RIVER TELEPHONE COMPANY, Respondent, v.
THE WATERVLIET TURNPIKE AND RAILROAD COMPANY,
Appellant.

New York Court of Appeals, June 3, 1890.

(121 N. Y. 397.)

WIRES IN STREETS.—INTERFERENCE.

In an action brought by a telephone company for a perpetual injunction to restrain an electric railroad company from operating the single trolley system in a street previously occupied by the plaintiff, upon the ground that the telephone circuit would be seriously interfered with both by conduction and induction, the Special Term having granted a temporary injunction order, which had been affirmed by the General Term, the appeal therefrom to the Court of Appeals was dismissed upon the ground that the order was not reviewable in that court.

Two judges dissented, however, upon the ground that the complaint set up no cause of action; and the same thought was strongly intimated in the prevailing opinion.

APPEAL from order of General Term, continuing for thirty days a temporary injunction granted at Special Term. Facts stated in opinion.

Matthew Hale and Marcus T. Hun, for appellant.

D. Cady Herrick, for respondent.

ANDREWS, J.: We cannot entertain the appeal without disregarding a long line of decisions in this court, holding that the granting of an injunction *pendente lite* rests in the sound discretion of the court of original jurisdiction, and that this discretion is reviewable only by the General Term. There is an exception to this rule "where," as we said in *Williams v. W. U. T. Co.*, 93 N. Y. 640, "it plainly appears on the face of the complaint that the case is one in which, by settled adjudication, the plaintiff, upon the facts stated, is not entitled to final relief," and the appeal to this court is from an order granting the injunction.

The plaintiff is a telephone company organized under the general act (chap. 265, laws of 1848) "for the incorpora-

tion and regulation of telegraph companies," and the acts amendatory thereof. By the fifth section of the original act, and the act chapter 471 of the laws of 1853, telegraph companies organized under these statutes are authorized to erect and construct, from time to time, the necessary fixtures for their telegraph lines, "upon, over or under any of the public roads, streets and highways" within this State, but subject to the restriction that "they shall not be so constructed as to incommode the public use of said roads or highways." The plaintiff, claiming to be a telegraph company within the meaning of the act of 1848, in the year 1883 (the year of its incorporation) erected upon Broadway, in the city of Albany, poles for its wires, and perfected its system of telephone communication, using the wires strung upon said poles for the transmission of the current of electricity required in telephone communication, and has ever since continued such use. The defendant was originally incorporated by chapter 141 of the laws of 1828 as a turnpike company, with power to construct a turnpike road between Albany and West Troy. It constructed its turnpike road under said act between the points named. By chapter 233 of the laws of 1862, it was authorized to construct and maintain railroad tracks over its turnpike road and to extend the same into and through the villages of West Troy and Cohoes and the town of Watervliet, and also "with the consent and with such restrictions as may be deemed proper by the common council of the city of Albany, to extend and maintain such railroad track or tracks and ways from the southerly termination of said turnpike road in and through Broadway, in said city, to South Ferry street." By the fourth section of the act the defendant was authorized to operate such road "by the power of horses, animals or any mechanical or other power, or the combination of them, which the said company may choose to employ, except the force of steam." Soon after the passage of the act of 1862, the defendant, pursuant to the act, changed its corporate name to the present one, and having obtained the written consent of the common council

of the city of Albany to lay a track or tracks for a horse railroad in Broadway, constructed and, until 1889, operated a horse railroad upon its turnpike road and through Broadway to South Ferry street in the city of Albany.

In 1889, the defendant, proposing to substitute electricity in place of horse power for the movement of its cars, applied for and obtained the consent of the common council of the city of Albany to erect posts in Broadway and to string wires thereon, and to operate its cars through that street to South Ferry street "by means of electric motors." The defendant thereupon made the necessary changes required for the operation of its road by electricity under what is known as the single trolley system. It erected a power house on the line of the Troy road, and posts in and along Broadway and the line of the turnpike road, and strung the necessary wires, and, prior to the commencement of this action, the road had been put in successful operation, under the new system, from its northern terminus to near the south line of the city of Albany, a distance of several miles. The defendant, having completed its structure, was about to commence running its cars by electricity on Broadway, when the injunction order in this action was issued. The object of the action is to obtain a final injunction, restraining the defendant from using the single trolley system in the operation of its road on Broadway. It appears with reasonable certainty from the complaint and affidavits used on the motion for the injunction, that the operation of the defendant's road by the single trolley system will result in serious disturbance of the telephone service. It is sufficient for the present purpose to state that this apprehended disturbance will arise in two ways: First, by the earth distribution of the current of electricity, conveyed by the trolley wire suspended over the road of the defendant and the attachment to the motor on the defendant's cars, and thence discharged onto the rails and track, which discharged current will in part find its way through the earth to any neighboring conductors of electricity, including the wires used by defendant for the earth

or ground circuit of the telephone system ; and, second, by what is called induction, that is by inducing on the telephone wire currents of electricity corresponding in variation with the variable currents used on the trolley wire. The effect of each of these causes, as appears by the testimony of the electrical experts, is to confuse and drown the minute current used in the telephone service, and prevent or greatly interfere with communication by telephone. The complaint is based on the theory that such an interference by the defendant in the use of the single trolley system violates the chartered rights of the plaintiff, and is an unlawful invasion of its property and privileges. The complaint sets forth that the system adopted by the defendant is not properly constructed, so as to protect the plaintiff from injury, and that there are other systems of operating roads by electricity, "by which the defendant can operate its road without affecting the plaintiff, its plant, equipment or service in any material degree, and with safety to the public." But it is not alleged that the system used by the defendant is not a proper and suitable one for its own purposes, nor that in its construction the defendant has omitted any precaution which might have been taken for the protection of the plaintiff.

The evidence strongly preponderates in support of the contention of the defendant that the single trolley system for the propulsion of street cars by electricity is the best in use, "having regard to mechanical, electrical and financial considerations." (Op. LANDON, J., General Term.)

The use of a grounded circuit is not necessary to a telephone system. The substitution of a metallic circuit such as is used on long distance telephone lines will, it is admitted, prevent any material disturbance from the operation of the defendant's road by the single trolley system. There is no dispute that the substitution by the plaintiff of the metallic for the earth circuit is practicable, but the change would involve a large outlay, and on the other hand the testimony of the experts is, that beside obviating the disturbance caused by the defendant's road, the change

would promote the general efficiency of the telephone service.

It is sufficiently obvious from this summary statement that the question presented in this case involves very important public and private interests. The plaintiff is but one of a large number of telephone companies which, under the general permission of the statute for the incorporation of telegraph companies, have erected poles and strung their wires in the streets of the cities and villages of the State. The claim that under this permissive grant they can exclude the use of the streets by electric railways, or for other street purposes requiring the use of electricity wherever the use of this agent interferes with the use of the telephone, although the municipality may consent and the public interest will be promoted by the other uses to which the streets are sought to be subjected, needs but to be stated to induce hesitation.

We have examined with care the questions involved in this case, and we are compelled to say that we entertain very grave doubts whether, upon the facts stated in the complaint and affidavits, any cause of action exists in favor of the plaintiff, and whether the plaintiff had any remedy for the injury of which it complains, except through a readjustment of its methods to meet the new condition created by the use of electricity by the defendant under the system it has adopted. But we think we ought not to dispose of the case upon its merits in this proceeding. The questions are new and difficult, and courts elsewhere have differed upon them. The trial of the case upon the merits is now proceeding, wherein the facts will be judicially ascertained, and in case an appeal shall be taken upon the final judgment rendered to this court, we shall then be better able than now to determine the ultimate rights of the parties.

The present appeal should, therefore, be dismissed.

All concur, except FINCH and PECKHAM, JJ., dissenting, on the ground that the complaint states no cause of action.

Appeal dismissed.

Telephone Co. v. Railroad Co.

NOTE.—This case is cited in *Cincinnati Inc. Pl. Ry. Co. v. City, &c. Assn., post.* See note to said case.

This action was tried upon the merits before Isaac Lawson, Esq., as referee, by whom it was decided in favor of the defendant. The judgment entered on his report was reversed by the General Term (61 Hun, 140), but the order of reversal was reversed by the Court of Appeals and the original judgment affirmed (135 N. Y. 898). The opinion of the Court of Appeals will appear in the next volume.

THE EAST TENNESSEE TELEPHONE COMPANY V. THE KNOX-
VILLE STREET RAILROAD COMPANY.

Chancery Court, Knoxville, Tenn., April, 1890.

(From private print.)

WIRES IN STREETS.—INTERFERENCE.—INJUNCTION.

A telephone company using the streets of a city for its poles and wires by virtue of an ordinance granting it "the privilege of erecting poles on the public streets and alleys" is not entitled to an injunction restraining an electric railway company also licensed by the city from using either the earth for its return currents or maintaining its wires overhead.

The telephone is not, and the electric railway is, a proper street use.

THE facts are stated fully in the opinion.

Ledgerwood & Carty and *Vertrees & Vertrees*, solicitors for complainant.

S. H. Heiskell, Washburn & Templeton and *Lucky & Yoe*, solicitors for defendant.

GIBSON, Chancellor.: This is a suit brought by the telephone company to enjoin the railroad company from using the earth as a return electric circuit, and from interfering with the electrical condition of the air, to its injury. The telephone company claims: 1st, That it has a grant from the city to erect poles and string wires in, over and along

all the public streets and alleys of Knoxville; 2nd, That it has such posts and wires, and is doing a telephone business; 3rd, That the railroad company is about to use electricity as a motor, with the earth for a return circuit; 4th, That the telephone company is now using the earth for its return circuit; 5th, That both companies cannot so use the earth at the same time, as the telephone circuit is too delicate to contend with the railroad current; 6th, That the railroad company's wires are also liable to so affect the electricity in the telephone wires, or are liable to so charge the air with electricity, as to interfere with the very delicate electrical currents used by the telephone company; and 7th, That the telephone company has a "vested right" to the "exclusive use" of the earth and the air as against every person using the same for electrical purposes to the detriment of its telephones. For these reasons, the telephone company has obtained a temporary injunction against the railroad company inhibiting the latter from using the single trolley system, or any other system that uses the earth for a return circuit.

To this bill the railroad company has put in a sworn answer, setting up, among other defenses, the following: 1st, The ordinance under which the telephone company claims its rights does not vest in it any such rights as it claims; 2nd, That what rights the ordinance does give are not the property of the telephone company; 3rd, That the railroad company's electrical appliances will not injure the telephones; and 4th, That if they should, the injury can be cheaply remedied. On this answer, the defendant moves the court to dissolve the injunction.

On the hearing of this motion, the affidavits of many electrical experts have been read, much electrical literature has been offered, not a few judicial opinions have been cited, and most able and elaborate arguments have been made. The whole subject of electricity has been brought before the court, including a miniature telephone plant, and a miniature electric car and electric railroad, so that Menlo Park itself

seemed, in miniature, before the court, as well as its great wizard, Edison, whose affidavit has been read, and of whom it might well be said, "Electricity is electricity, and Edison is its prophet."

It will thus be seen that I am invited to voyage on the unexplored ocean of electrical knowledge; but, on consulting the pleadings (which are my letters of instruction), and the law (which is my chart), I find that I am not required to wander beyond the sight of the great headlands of the facts in steering my craft to the haven of decision. The main questions for determination presented by the pleadings, are: 1st. Were such rights as the telephone company claims conferred upon it by the city of Knoxville? 2d, If so, are they exclusive and monopolistic in their nature?

On examining the bill I find that the telephone company avers that on October 22, 1880, it was "granted the right and privilege to erect its poles in, over and along the public streets, alleys, lands, roads and public squares of the city, to string its wires thereon, and to use and operate the same for the purposes of telephonic and telegraphic communication;" and that relying on said franchise it has constructed a telephonic plant and is now operating the same.

This averment is the foundation of the telephone company's right and claim to relief; and the truth of this averment is doubly denied by the railroad company, which says that no such franchise was granted, and that what was granted, was granted to the telephone "exchange" and not the telephone "company." On examining the ordinance of the city, I find it reads as follows:

Be it ordained, &c., that the privilege of erecting poles on the public streets and alleys of Knoxville be granted to the East Tenn. Telephone Exchange, and this privilege of erecting posts shall be confined to the telephone exchange purposes exclusively. That the posts erected shall in no way interfere with the public travel along the streets, sidewalks and public alleys of the city. That nice posts, straight and smooth, be required, and that the same be in line with the outside edge of the curbing.

To an impartial mind this ordinance does not seem to "grant the right and privilege to erect poles in, over and along the public streets, alleys, lands, roads and public squares of the city." The ordinance confines the location of the poles to the streets and alleys, and says nothing whatever about "lands, roads and public squares;" nor does it say the poles may be erected "in, over and along the public streets," etc.; it says, "on" the streets, and "in line with the outside edge of the curbing." Neither does the ordinance say a word about any right "to string wires" on said poles, or about "using and operating the same for the purposes of telephonic and telegraphic communications."

I mention these matters for the purpose of ascertaining what rights were granted by said ordinance, to measure their comprehensiveness. The bill claims practically unlimited rights to erect poles, string wires and "use and operate the same" "in, over and along" all the "public streets, alleys, lands, roads and public squares" in the city; whereas the ordinance merely gives the "Exchange," not the company, the "privilege of erecting poles on the public streets and alleys, this privilege to be confined to the telephone exchange purposes exclusively."

It must be remembered that the telephone company does not claim any particular right of way, or strip or piece of ground, or any particular streets or alleys within the limits of Knoxville, for its earth circuit, but it claims the whole of the surface of the earth, and all that is beneath the surface of the earth, within the corporate limits, as its exclusive property for all the purposes of an earth circuit.

Now, if at the time this ordinance was passed, any one had suggested that this limited privilege of "erecting poles" gave to the telephone exchange a right to use all the ground on which the city stood, public and private, as an easement to be used in place of wires, to complete the electrical circuit, he would, no doubt, have been regarded as a wilful distorter of language. But, if in addition, he had claimed that this meagre privilege of "erecting poles"

not only gave the telephone exchange a right to use all the ground, public and private, within the corporate limits, as its own, but the right to use it to the exclusion of all the other electric companies from now to the ending of the world, he would have been regarded as a wicked exaggerator, if not a deliberate falsifier. And yet this is exactly what the telephone company claims in its bill.

I am unable to so construe the scant "privilege of erecting poles" so as to make it "grant the right" to the exclusive use of every inch of ground within the corporate limits, for all the purposes of an earth circuit for electricity. Such a grant could never have been in the minds of the mayor and aldermen, and I am unable to find these exclusive rights and monopolistic powers condensed in five such harmless words as "the privilege of erecting poles."

The telephone company, however, does not content itself with literally claiming the exclusive right of the whole of the earth on which Knoxville is built, for its return electrical currents, but it claims a monopoly of the whole of the air also, and insists that no other electrical company can string its wires in the near neighborhood of the telephone wires. And thus the simple privilege of "erecting poles" on the side of the streets of Knoxville is magnified into a grant of the exclusive right to all the earth and all the air within the corporate limits of Knoxville, for all electrical purposes except telegraphing.

But it may be argued that the ordinance says that "this privilege of erecting poles shall be confined to telephone exchange purposes exclusively." So it does, but will it be contended that these words, which are rather words of limitation than of extension, give the telephone company the exclusive right to use every inch of Knoxville's ground, and a superior right to all of its air, as its private property for electrical purposes?

And thus it is, this once humble telephone company that was given the bare privilege of "erecting poles" on the edge of the curbing, now comes forward, and by virtue of

those two talismanic words, claim the right to make the electric light companies, the electric railroad companies and all other electric companies for all time to come, keep their wires from communicating with any part of the ground on which the city stands, or else pay it for the privilege of so doing. In a word, it claims perpetual monopoly of the earth on which the city is built, for all the uses of an electrical circuit; and also claims a superior right to the air itself for electrical purposes.

Ordinarily a person's strength consists in his physical powers, but the telephone company's strength is sought to be derived from its weakness; it says that its electrical current is so weak that all strong currents greatly affect and impair its usefulness, and that, as a consequence, no company using a strong current can lawfully use the earth for a return circuit without its leave. If this contention be correct, then no electrical company can ever use the underground of which Knoxville is built without the consent of the telephone company. It makes no difference what grand discoveries and inventions in the use of electricity may be made; coal, wood, gas, steam and animal power may all be superceded by electrical devices; machines may be invented to heat and light all our homes, do all of our cooking, propel all of our vehicles and machinery, and all or a large part of this electricity may be drawn from the earth, or it may be drawn from the air, and yet Knoxville and all her people are to be denied all of these wonderful benefits, for all the ages to come, if they, either through the earth or through the air, in any way cripple or injure the feeble current of the telephone company—unless the telephone company gives or sells its consent. Well might one exclaim, in the language of Cassius, when talking of Cæsar's former weakness and present power:

“Ye gods, it doth amaze me,
A thing of such a feeble temper
Should so get the start of the majestic world
And bear the palm alone.”

The streets of Knoxville are held in trust by the city for the benefit of the people, to the end that the people may have the right to walk and ride and transport goods and animals, and propel vehicles over and along them. And the city has no right to allow the streets to be used for any purpose inconsistent with these rights of travel and transportation. Telephone poles have no connection with travel or transportation, and have no just rights on our streets, and are, at best, mere tenants at will. These doctrines were distinctly recognized by the city when it granted this privilege of "erecting poles," the ordinance emphatically providing that "the posts erected shall in no way interfere with the public travel." It may be said that the trouble grows not out of the "posts," but out of the "wires." To this it is answered that the word "wire" is not in the ordinance, and all the right the telephone company has to use wires is as an incident to the posts, and what the ordinance means, is that neither the posts nor the wires on them shall in any way interfere with the public travel. In other words, this privilege of "erecting poles" or posts is to be in every respect subordinate to the use of the streets for public travel. If this be the meaning of the ordinance, then the city has the right to allow electricity to be used as a motor for the propulsion of street cars, and if the telephone poles or wires "interfere with the public travel" on these electric cars, the city has a right to have them removed. And on this ground, also, it will thus be seen that instead of the telephone company having exclusive and monopolistic rights, both to the earth and to the air, for electrical purposes, it is a mere humble occupant of the streets by permission of the city, and liable to be declared a nuisance whenever its poles or wires interfere with public travel.

Fast, indeed, must our rights be slipping from us, and most insecure indeed must be their mooring, when such claims as these are countenanced by the courts. I have heretofore declared, in a suit between the defendant and the city, that our streets are public property under the

trusteeship of the mayor and aldermen, and very slowly and very reluctantly will I ever decide that any property of the people has become the fee of one person, whether such person be a Kentucky corporation or one native born.

I might go further, and show that there is no evidence or allegation that the E. T. Telephone Company, a corporation under the laws of Kentucky, is the E. T. Telephone Exchange that acquired this privilege of "erecting poles." The answer denies their identity, and the ordinance supports their answer. In the light of the present claims of this telephone company to the benefit of this ordinance and to the monopoly of the ground on which the city stands for all the purposes of an earth circuit, I can only say that if such was its object when it secured the apparently humble privilege of "erecting poles," it was seeking to perpetrate a fraud upon the city of Knoxville, whose mayor and aldermen could not have supposed that they were selling the birthright of their constituents for less even than a mess of pottage. The courts must see to it that no public grants and no privileges granted shall be so construed as to deprive the people of any rights or powers, except such as are expressly stated or necessarily implied. In applying this rule, I hold that the ordinance referred to did not give the telephone company any such exclusive right as it claims; and I am further of the opinion that, under its charter powers, and under the corporation ordinance, the Knoxville Street R. R. Company has the right to propel its cars by the single trolley electric system, or by any other the city has authorized or may authorize.

Messrs. Carty and Vertrees, the solicitors of the telephone company, have made most able and instructive arguments, showing that comprehension of the merits and magnitude of the controversy, so characteristic of the diligent and zealous lawyer; and the principal difficulty I have had in reaching a conclusion has been the intellectual fascination wrought upon me by their argumentation. I admire, honor and love genius, learning, diligence and zeal, and confess that they cast upon me in this case a spell to which

I would have bowed had not duty sternly commanded me to do as I have done.

The result is, the temporary injunction will be dissolved.

NOTE.—See note to *Cincinnati Inclined Plane Ry. Co. v. City, & Assn.*, *post*.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY V.
UNITED ELECTRIC RAILWAY COMPANY ET AL.

U. S. Circuit Court, M. D. Tenn., May 19, 1890.

In Equity.

(42 Fed. R. 273.)

ELECTRICAL INTERFERENCE.—INJUNCTION.—TELEGRAPH INCLUDES
TELEPHONE.

Application for injunction at suit of a telephone company, to restrain an electric railway company from using the single trolley system or any other requiring the use of the earth for a return circuit, denied, it appearing that the defendant was making lawful use of its franchise, without negligence or unnecessary disregard of plaintiff's rights; that the injury to plaintiff was not the result of defendant's plan of construction; and that plaintiff had a more effective remedy in the metallic circuit or McCluer device than any which was open to the defendant; also held that the plaintiff should apply such remedy at its own expense.

"Telegraph companies," in a statute, includes telephone.

Cases of this series cited in opinion: *Wisconsin Telephone Co. v. Oshkosh*, vol. 1, p. 687; *Attorney-General v. Edison Telephone Co.*, vol. 2, p. 440, note.

BILL in equity at suit of a telephone company to restrain five electric street railway companies from using any system of electric propulsion which involves the use of the earth as a return circuit.

The grounds of complaint were as follows: That the electricity which is supposed to return to the dynamos by means of the iron rails, scatters through the earth, and is thereby conducted to the wires of the telephone company

through various agencies, known as "conduction" or leakage, and this current, being stronger, overcomes the weaker current of the telephone, producing loud, buzzing noises, and wholly preventing, or greatly interfering with, telephonic communication. Besides, the electricity thus conducted acts upon the bells of subscribers when there is no call from the central office, causing them to ring, and also causing a great number of annunciators at the exchange to fall at one time, so that the operators cannot tell who, if any one, has called. That, if the currents used by the cars were constant and uniform, it would not interfere with the telephones. It further averred that the service was interfered with by *induction*, where a varying current of electricity, conveyed on a conducting wire, will produce in a parallel wire other currents of electricity. The varying current upon a trolley line induces a like current in the parallel telephone wires on the same street, and also, as in the case of conduction, produces the noises and sounds, and rings the bells of subscribers, and throws down the annunciators. The bill also charged that the single trolley was dangerous to life and property. If, by winds and storms, a telephone wire should break, and fall across the trolley, it might be fatal to man or beast to touch it, and dangerous to the lives of those in the telephone exchanges, sometimes causing fire in the houses of subscribers. The bill concluded that all these troubles and dangers would be avoided if defendants would use an entire metallic circuit, or double trolley, properly constructed, and that the same result would follow if complainant would use a complete metallic circuit for every one of its subscribers; but the latter would nearly double the cost of the plant, and grave difficulties would be encountered at the central office, which it was not certain could be successfully overcome. On the contrary, the single trolley could be converted into a double trolley at a comparatively small expense. That, in consequence of these interferences, subscribers make constant complaints, many threaten to, and some actually do, refuse to pay for their telephones.

The answer did not make an essentially different case, but averred that in February, 1889, all the defendants were sold to the United Electric Railway; that each company had sold its mules, and changed its stabling to an electric car plant; that the entire system furnishes transportation to 15,000 persons per day. It denied that the metallic return wire has failed to protect the telephone, and averred that little or no trouble was experienced on the route so protected. It further alleged that, of the four methods of equipping electric railways, viz., storage batteries, the conduit system, double trolley overhead and single trolley overhead, all have substantially proved to be failures, except the last. It denied that the complainant was entitled to a monopoly of the earth for its return circuit, and insisted that it should make use either of a complete metallic circuit, or of a device known as the "McCluer device" for its return circuit.

Vertrees & Thos. H. Malone, for complainant.

East & Fogg, J. C. Bradford, John S. Wise and John Ruhm, for defendants.

BROWN, J.: We do not care, in this case, to discuss the constitutionality of the act of 1885, or the present obligation or effect of the contract entered into between the complainant and two of the defendant railway companies, under which the latter agreed to furnish proper return wires to the telephone company in order to obviate the difficulties experienced by the escape of electricity from their rails. We prefer to assume that both these parties are lawfully exercising their franchises, and to consider their respective rights and obligations unembarrassed by any previous contracts or understandings. We see no reason to doubt the position assumed by the complainant, that a telephone company is a telegraph company, and that, under its right to construct and operate telegraphs, it was empowered to establish a telephone service. *Attorney-*

General v. Telephone Co., 6 Q. B. Div. 244; *Telephone Co. v. City of Oshkosh*, 62 Wis. 32 (21 N. W. Rep. 828).

Complainant, in operating its instruments, connects each telephone with the ground by what is termed a "ground wire," through which the return current of electricity is carried to the earth, and perhaps through the earth, acting as a conductor, back to the telephone exchange. Such return, in some form or other, is necessary to the production of a current of electricity in every case. Defendants, upon the other hand, use a single overhead wire or trolley, suspended over the middle of the track, along which the electric current passes, descending by the trolley rod or mast through the cars to the motors underneath, and thence to the rails, which are connected together at their ends, and which operate to convey the return current back to the dynamos at the power house. The evidence, however, establishes the fact that the current does not all return by the rails. Much of it escapes, becomes scattered through the earth, ascends through the ground wires to the telephones, and seriously impairs their operation, by causing a humming or buzzing noise, which drowns the voice of the speaker, and often causes the annunciators in the exchange to fall, and the bells to give false calls, so that it is impossible for the operators to tell which, if any, of its subscribers have called, and, in short, throws the whole system into confusion.

That these evils exist, to the serious detriment of the telephone service, is not denied; but it also appears from the evidence upon both sides that they are not absolutely insurmountable. Indeed, there are but few serious questions of fact in this case, and these turn upon the relative practicability and expense of the several methods of overcoming this difficulty. In solving these questions, we are compelled to bear in mind the fact that the science of electricity is still in its experimental stage; that a device which to-day may be the best, cheapest and most practicable, may, in another year, be superceded by something incomparably better fitted for the purpose. It is quite possible,

too, that the legal obligations of the parties may change with the progress of invention, and the duty of surmounting the difficulty be thrown upon one party or the other, as a cheaper or more effectual remedy is discovered. For example, if it were shown that by the use of a certain device the defendants could control their return current in such a way as not to interfere with the use of complainant's instruments, the law might treat their failure to adopt such measures as negligence in the use of their franchise, and enjoin them, or hold them liable for all damages sustained by the complainant. If, upon the other hand, the difficulty can be better controlled by a device applicable to telephones, it might be incumbent upon the complainant to adopt it, leaving the courts to settle the further question, whether the expense of so doing is recoverable of the defendants. We are thus compelled to consider this case with reference to the present state of the art, and with the possibility, that in another year circumstances may so change as to reverse completely the legal obligations of the parties. Indeed, since the litigation between the telephone companies and the electric railway companies originally began, considerable progress has been made towards a solution of the problem. Let us consider the respective methods now suggested:

1. The double trolley. There seems to be no doubt that if defendants adopt a second trolley wire, the return current might be carried back to the dynamos without coming in contact with the earth at all, and the difficulty be completely overcome. Upon the other hand, we are satisfied from the affidavits that this would not only entail a large expense upon the defendants, but that it disfigures the streets with a complicated net-work of wires, and, wherever there are curves, turnouts or switches, renders the road very difficult of operation. There are two of these double trolley roads in operation in Cincinnati; and they are used to a limited extent in other cities. But the facts that nine-tenths of the electric railways in this country are equipped with a single trolley, and that, in most of the cities where

the double trolley was formerly used, including Montgomery, Pittsburgh, Denver, Albany and Appleton, they have been abandoned, are strong arguments against their practicability. Indeed, it is only where the roads make use of a double track that the double trolley can be made a success. Add to this that, in the numerous cases between the telephone companies and the electric railways which have arisen in other States, the courts have uniformly held the double trolley to be a failure as applied to single tracks, and it would seem that the question could no longer be considered an open one.

2. There seems to be no doubt that the evil may also be remedied by a return wire attached to each telephone, by which the current is carried directly back to the exchange, instead of being dumped into the earth. This, however, is open to the same objection as the double trolley. It is not only very expensive, doubling the cost of the electric plant, but would double the number of wires carried through our streets, already far too numerous for comfort, beauty or safety. In addition to this, it involves a large outlay and increased complication and expense for the central office; there being not only two-line wire terminals to provide for every subscriber, but four terminals to handle for every connection, instead of two, as with the single wire and earth systems. Upon the whole, we deem this to be impracticable.

3. A third device known as the "McCluer system," remains to be considered. This contemplates the employment of a single return wire upon each route disturbed by the railway service, to which each telephone upon that route is connected, and which operates to complete the metallic circuit. If we are to believe the affidavits of those who are familiar with this device, it affords a perfect remedy for all disturbances produced by leakage or conduction, though there are also slight disturbances produced by induction from parallel wires, from which no complete relief has been discovered by any kind of metallic circuit, unless supplemented by the use of non-inducting cables,

Telephone and Telegraph Co. v. Railway Co.

and the transposition of wires. This evil, however, is remediable by increasing the distance between the parallel wires, and does not seem to be regarded as a serious matter. It is true, defendants have produced affidavits which tend to throw some doubt upon the utility of the McCluer device, but this doubt seems to have arisen more from the reluctance of the telephone companies to adopt it than from any proven insufficiency. We think we are justified in assuming that the adoption of this device by the complainant would obviate the disturbances now produced by leakage.

The case, then, practically resolves itself into the question, at whose expense shall this change be made? As the testimony tends to show that the introduction of the McCluer device into the telephone service of Nashville would not cost to exceed \$10 to each telephone, the question is not vital to the existence of either of these companies. At the same time, as it is one that confronts the telephone and electric railways in every city of the country where both are used, it becomes of great importance. Are the telephone companies, which have the prior right to use the streets, bound to conform their business to the demands of these new comers, though by so doing they put themselves to large expense? Or are the railway companies bound, as a condition of occupying the same territory, to see to it that, in operating their roads, no incidental damage is done to their neighbors? If the existence of one was absolutely incompatible with the continued operation of the other, it might be incumbent upon us to make a choice between these two great benefactions, both of which will rank among the necessities of modern urban life. But, as we are bound to assume that they can be persuaded to live together in harmony, the case virtually resolves itself into a question of liability for certain damages sustained by the complainant. In this view, it is open to serious doubt whether it is entitled to invoke the aid of a court of equity at all. Conceding that the case made by the bill is one of equitable jurisdiction, still the granting or withholding of

an injunction is largely a matter of discretion, and if, upon all the pleadings and the testimony, the court can see that it involves a mere question of dollars and cents, it may well hesitate to stop the operation of these roads by resorting to the harsh remedy of an injunction, especially in view of the fact that the defendants are amply able to make reparation. We do not desire, however, to dispose of the case upon this ground.

It would be perfectly competent for us to stay the issue of an injunction, as has already been done in one or two cases, until a reasonable time had elapsed for the ascertainment and payment of these damages; and, as both parties have addressed their arguments to the question of liability, we are disposed to give them the benefit of our views.

We are referred in this connection to a large number of decisions of courts of the highest respectability upon the very questions involved in this case. If these decisions had been harmonious, we should not have hesitated to defer to them; but, as these courts have reached different results, we do not feel like indicating a preference for one or the other. While all are persuasive, none are controlling; and we have deemed it more satisfactory to treat this as an original question, and inquire how far it may be answered by the application of well settled principles.

We are asked to determine how far a person making a lawful and careful use of his own property, or of a franchise granted to him by the proper municipal authorities, is liable for damages incidentally caused to another; in other words, whether the right of the latter to an injunction does not depend upon something more than the simple fact that he has suffered injury, though his right to an undisturbed use of his own may antedate that of another. It is true that in one case, namely, *Reinhardt v. Mentasti*, 42 Ch. Div. 685, it is said that the principle governing the jurisdiction of the court in cases of nuisance does not depend upon the question whether the defendant is using his own reasonably or otherwise, but upon the question, does he

injure his neighbors? This case lays down a broader doctrine of liability than any to which our attention has been called, but it is sufficient to say in reply to it that nothing which is authorized by competent authority can be treated as a nuisance *per se*. *Transportation Co. v. Chicago*, 99 U. S. 635; *Hinchman v. Railroad Co.*, 17 N. J. Eq., 77; *Easton v. Railroad Co.*, 24 N. J. Eq. 58; *Railway Co. v. Heisel*, 38 Mich. 62; *Davis v. Mayor*, 14 N. Y. 506. We take it to be well settled, so far as persons operating under legislative grants are concerned, that something more than mere incidental damage to another must be proved—something, in fact, in the nature of an abuse of the franchise—to entitle the party injured to an injunction. It is perfectly obvious that there are a large number of instances in which a person may suffer damages without recourse to the offender. Thus, the smoke that fills our lungs and soils our garments; the dust that enters our dwellings and stores, and damages our furniture; the noxious odors that assail our nostrils; the impure water we are sometimes compelled to drink—are the necessary penalties we pay for living in cities; but in ordinary cases there is no legal remedy for the evil. In the somewhat flowery language of Lord Justice JAMES, in *Salvin v. Coal Co.*, L. R., 9 Ch. 705:

“If some picturesque haven open its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes.”

I may expend a fortune in building a handsome house 30 or 40 feet from my front fence. My neighbors upon either side may build theirs upon the line of the street, and completely ruin its market value. In the absence of a prescriptive right on my part, they may wall up my windows, and completely exclude the light, or undermine the foundation of my outer wall so that it crack and tumble down. But, if it be necessary to the beneficial enjoyment of their own property, I have no remedy. *Panton v. Holland*, 17

Johns. 92. There are undoubtedly a large number of cases where persons have been held liable for an infringement upon the maxim. *sic utere tuo ut alienum non laedas*; but, upon examination, they will usually be found to turn upon questions of negligence or nuisance.

1. There is no doubt that every person is bound to the exercise of reasonable care in the use of his own property; and, for any default in that particular, he will be liable to the person injured in an action for negligence. Thus, in *Vaughan v. Menlove*, 3 Bing. N. C. 468, defendant was held liable for negligence in building a hay-rick so near the extremity of his own land that, in consequence of its spontaneous ignition, his neighbor's house was burned, although, in *Higgins v. Dewey*, 107 Mass. 494, this principle was limited to cases where the burning was negligent, or might reasonably have been expected to injure the property of the neighbor. This was the real ground upon which a recovery was permitted in the leading cases of *Rylands v. Fletcher*, L. R., 3 H. L. 330, though the case is often cited for the broader proposition, that the person who, for his own purpose, brings on his land and collects and keeps anything there likely to do mischief if it escapes, must keep it at his peril. This case has not been accepted either in England or in this country without some qualifications. The same rule applies if a man permit a wall which had been negligently constructed to fall upon his neighbor's house (*Gorham v. Gross*, 125 Mass. 232), or a chimney to which a gas-light company had fastened a telegraph wire (*Gray v. Gas-light Co.*, 114 Mass. 149). The principle of these cases was also applied in *Tarry v. Ashton*, 1 Q. B. Div. 314, where it was held to be the duty of a person hanging a lamp over the highway to keep it in good repair. This case proceeds, perhaps, as far as any in holding the defendant responsible.

To the same principle is also referable the case of *Coke Co. v. Vestry of St. Mary Abbott's*, 15 Q. B. Div. 1, whereby the defendants were held liable for using steam rollers,

in repairing a highway, so heavy that they injured the gas pipes of the plaintiff. The statement of the case shows that the pipes were laid from 20 to 24 inches beneath the surface of the streets, and that this was a sufficient depth to prevent their being injured by the ordinary travel of the streets, and also by the ordinary mode of repair, if steam rollers of great weight had not been used. The decision was put by the court upon the express ground that heavier rollers were used than were necessary; and it was said that, if "the defendants were expressly authorized by statute to use steam rollers of such a weight as necessarily to injure the plaintiff's pipes, the plaintiffs would have no ground of complaint. The case would be then one of *damnum absque injuria*. The same consequence would follow if the defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam rollers, or other machinery which could not be worked without injuring the plaintiff's pipes."

2. Similar to these are the cases in which persons have been held liable for keeping upon their land anything which operates as a nuisance to their neighbors generally, or to any particular individual. Upon this principle, if a person allows a privy to get out of repair, and the water percolates into his neighbor's cellar (*Tenant v. Golding*, 1 Salk. 21; *Ball v. Nye*, 99 Mass. 582; *Ballard v. Tomlinson*, 29 Ch. Div. 115; *Cooley*, Torts, 568), or maintains a mill-dam in an unsafe condition (*Mayor v. Bailey*, 2 Denio, 433; *Gray v. Harris*, 107 Mass. 492), or permits injurious accumulations of snow or ice upon his roof (*Shipley v. Fifty Associates*, 106 Mass. 194), or permits loud and unnecessary noises (*Brill v. Flagler*, 23 Wend. 354; *Tanner v. Albion*, 5 Hill, 121), or carries on a trade offensive to the neighborhood by reason of dust, smoke, foul odors, or jar of machinery, or otherwise (*Cooley*, Torts, 600, 601), he is liable for the consequences. In all this class of cases the question whether the carrying on of an offensive business is a nuisance or not depends very largely upon the character of the neighborhood, the time it has been

carried on without objection, and the prior use of the building in the vicinity, as a trade may be adjudged a nuisance in one place and not in another. *Gilbert v. Showerman*, 23 Mich. 448; *Robinson v. Baugh*, 31 Mich. 290.

A leading case in the Federal courts is that of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317 (2 Sup. Ct. Rep. 719). In that case it was held that legislative authority to a railroad company to bring its tracks within the limits of the city of Washington, and to construct shops and engine houses there, did not confer upon it authority to erect noisy workshops in the immediate vicinity of a church where services had been held several times during the week for a number of years before the erection of the shops. But, in delivering the opinion in that case, Mr. Justice] FIELD drew a distinction between nuisances of that description, and a railway through the streets authorized by Congress, which, when used with reasonable care, produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, and affords no ground of complaint. "Whatever consequential annoyance may necessarily follow from the running of the cars on the road with reasonable care is *damnum absque injuria*."

3. There are also a few cases which indicate that, even if a man be guilty of no negligence, but is engaged in doing something dangerous in its nature, he is liable for the immediate and direct consequences of his act. Thus, in *Hay v. Cohoes Co.*, 2 N. Y. 159, the defendant, a corporation engaged in digging a canal, was held liable for blasting rocks in such a way that the fragments were thrown against and injured plaintiff's dwelling upon lands adjoining. It was held that it was liable, although no negligence or want of skill was alleged or proved. The doctrine laid down in this case, however, was carefully limited in the subsequent case of *Losee v. Buchanan*, 51 N. Y. 476, in which the owner of a steam-boiler was held not to be liable for damages occasioned by its explosion,

in the absence of proof of fault or negligence on his part, and it was said that the defendant was held liable in the *Cohoes case* upon the ground that its acts in casting the rocks upon the plaintiff's premises were direct and immediate. In the same line is the case of *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292), in which the defendants were held liable for the consequences of an ordinary spring freshet, without proof of negligence or unskilfulness on their part in the construction and maintenance of a tunnel through which water flowed and damaged the plaintiff's mill. Defendant's liability was put upon the ground that the damages the plaintiff sustained were the direct and immediate result of the defendants' operations on their own land. "The plaintiffs had a right to hold their property free of such a result of the defendants' use of their land." The authorities are carefully collated, and the opinion is a very instructive one. These cases would be opposite if the defendants had found it necessary, in the construction of their line, to cut the wires of the telephone company, remove its posts, or commit any other direct depredation upon its property.

4. Subject to these exceptions, we understand the law to be well settled that no person is liable for damages incidentally occasioned to another by the necessary and beneficial use of his own property, or of a franchise granted to him by the State. The principle is thus stated by Judge WOODWARD in *Panton v. Holland*, 17 Johns. 92-99:

"On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously."

Illustrations of this principle are plentifully scattered through the reports. It extends not merely to the digging up of ground for a new building, whereby the walls of the next house are injured (*Panton v. Holland*, 17 Johns. 92-99; *Thurston v. Hancock*, 12 Mass. 220), but to the burn-

ing of fallow land, whereby fire is communicated to adjoining lands (*Clark v. Foot*, 8 Johns. 329), to the erection of a mill dam, whereby water is in part diverted from a lower mill (*Platt v. Johnson*, 15 Johns. 213), to the building of a basin or bridge, whereby access to plaintiff's dock is obstructed (*Iansing v. Smith*, 8 Cow. 148 ; 4 Wend. 9 ; *Gilman v. Philadelphia*, 3 Wall. 713), and even to the pollution of a stream by the discharge of tan bark from an upper mill, which was suffered to float down upon the mill of the plaintiff, where it was shown to have been the uniform custom of the country to permit it (*Snow v. Parsons*, 28 Vt. 459). A distinction is drawn between cases where the pollution of a stream is indispensable to its beneficial use, and cases where the pollution is such as to make it absolutely useless to manufacturers lower down the river. Of the latter case is *Merrifield v. Lombard*, 13 Allen, 16, where the defendant threw vitriol and other noxious substances into the stream a short distance above plaintiff's factory, by means of which the water was corrupted so that it corroded plaintiff's engine and boiler, and rendered them unfit for use. In such cases the court will weigh the circumstances and necessities of the case, and the manner in which the stream has heretofore been used. Cooley, Torts, 587. In the case of *Coal Co. v. Sanderson*, 113 Pa. St. 126 (6 Atl. Rep. 453), it was held that one operating a coal mine in the ordinary and usual manner may drain off pump water upon his own lands, which percolates into the stream which forms the natural drainage of the basin in which the mine was situated, although the quantity of water may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. It was intimated that the use and enjoyment of a stream of pure water for domestic purposes must, from the necessity of the case, give way to the interests of the communities, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal. It is said, in the opinion of the court, to be "a general pro-

position, that every man has the right to the natural use and enjoyment of his own property; and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*; for the rightful use of one's own land may cause damage to another, without any legal wrong."

The same principle is applicable to the case of a public officer, who, if authorized by law to excavate earth in grading a street or constructing a tunnel, will not be responsible, in the absence of negligence, for damage to abutting property owners. *Smith v. Washington Corp.*, 20 How. 135; *Transportation Co. v. Chicago*, 99 U. S. 635; *Callender v. Marsh*, 1 Pick. 418; *Radcliff's Ex'rs v. Mayor*, 4 N. Y. 195. In this last case it is said that an act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow. The case of *McCombs v. Akron*, 15 Ohio, 474, in which it was held that a corporation was liable for injuries to plaintiff's property in cutting down and grading a street, is opposed to the great weight of authority, and in a number of cases has been denied to be law. See, also, *Chapman v. Railroad Co.*, 10 Barb. 360. In *Steel Co. v. Kenyon*, 6 Ch. Div. 773, it is said, with regard to the storage of water upon defendant's land, that it was necessary for the plaintiff to show, not only that he had sustained damage, but that the defendant had caused it, by going beyond what was necessary in order to enable him to have the natural use of his own land. In *Attorney-General v. Asylum*, L. R. 4 Ch. 146, defendant was held liable for polluting a stream by its sewage, upon the ground that the evil might have been remedied by depositing the sewage elsewhere. Other instances of serious damage, suffered without the possibility of recourse, may occur whenever a rival bridge is authorized to be built across a stream, as was done in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. The building of a new railroad may destroy the value of a turnpike, of a line of coaches, of

taverns, public houses and even of small towns lying along its lines. Illustrations are found in *Boulton v. Crowther*, 2 Barn. & C. 703; and *Nichols v. Marsland*, L. R. 10 Exch. 255.

In *Rockwood v. Wilson*, 11 Cush. 226, it is said that "nothing can be better settled than that, if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actionable negligence." What shall be considered indirect, as distinguished from direct injuries, is clearly stated in *Railroad Co. v. Marchant*, 119 Pa. St. 541 (13 Atl. Rep. 690), in which a construction was given to a constitutional provision of Pennsylvania, securing just compensation by corporations for property "injured or destroyed," as well as "taken." It was held to be confined to such injuries to one's property as are actual, positive and visible—the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured in advance, as distinguished from indirect injuries to the plaintiff, which were the result merely of a subsequent operation of its railroad in lawful manner, without negligence, unskilfulness or malice.

The substance of all the cases we have met in our examination of this question—and we have cited but a small fraction of them—is that, where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. *Hoyt v. Jeffers*, 30 Mich. 181. If, in the case under con-

sideration, it were shown that the double trolley would obviate the injury to complainant without exposing defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction ; but, as the proofs show that a more effectual and less objectionable and expensive remedy is open to the complainant, we think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained. We place our denial of an injunction upon the grounds :

1. That the defendants are making lawful use of the franchise conferred upon them by the State, in a manner contemplated by the statute, and that such act cannot be considered as a nuisance in itself.

2. That, in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant.

3. That the damages occasioned to the complainant are not the direct consequence of the construction of the defendants' roads, but are incidental damages resulting from their operation, and are not recoverable.

The cases involving this principle are almost innumerable; and in our examination of them we are satisfied the great weight of authority bears in the direction we have indicated. As a result, the motion for an injunction must be denied.

NOTE.— See note to *Cincinnati, &c. Ry. Co. v. City, &c. Assn.*, *post*.

**THE WESTERN UNION TELEGRAPH COMPANY, Respondent,
v. GUERNSEY & SOUDDER ELECTRIC LIGHT COMPANY,
Appellant.**

St. Louis Court of Appeals, June 2, 1891.

(46 Mo. App. 120.)

WIRES IN STREETS.—INTERFERENCE.—INJUNCTION.

An injunction at suit of a telegraph company (1) restraining an electric light and power company from stringing its wires above those of the plaintiff nearer than eight feet from them, and (2) compelling it to place a guard under its wires already strung, to prevent their falling, in case they should break or sag, upon the telegraph wires—on the ground of threatened danger to the plaintiff's instruments and employees, and delay of its service—held, properly granted.

The following rules were enunciated, bearing upon the case :

The rights of licensees, as well as of adjoining owners, are subject to additional legitimate uses which the city may make of its streets, even though such uses cause inconvenience, so long as they do not amount to a substantial subversion of private rights.

One electrical company cannot, by prior occupation under municipal license, obtain a right to a particular part of a street to the exclusion of subsequent licensees for legitimate street purposes ; though the rights of the prior licensee must not be substantially invaded by the latter.

The maintaining of poles and wires by an electric light company is a legitimate street use which may be licensed by the municipal authorities.

Upon the question of substantial interference with the operation of a telegraph line in a street, the rights of the company under national laws, *e. g.*, the post-roads act of Congress, and its duties as a *quasi* common carrier, have an important bearing.

The equity rule, recognized in some of the States, that a plaintiff is not entitled to relief by injunction against a mischief which he can guard against at slight expense, is not approved by the Supreme Court of Missouri.

Case of this series cited in opinion : *Julia Building Association v. Bell Teleph. Co.*, vol. 1, p. 801.

APPEAL by defendant below from order making perpetual a temporary injunction.

The facts sufficiently appear in the opinion.
Appeal from the St. Louis City Circuit Court.

Boyle, Adams & McKeighan, for appellant.

Hitchcock, Madill & Finkelburg, for respondent.

ROMBAUER, P. J.: This is a suit in equity to enjoin the defendant from transmitting currents of electricity through certain wires which it has suspended in proximity to the telegraph wires of the plaintiff. At the hearing there was a decree denying the relief sought, and dismissing the petition as to a portion of the wires of the defendant, and granting the relief sought, in a modified form, as to the remainder. From this decree the defendant prosecutes this appeal.

The petition recites the incorporation of the plaintiff and its acquisition, under various acts of congress, and through its consolidation with the American Union Telegraph company in pursuance of the laws of the State of New York, of the right to maintain its wires on any post-route, and pleads the act of Congress of March 1, 1884, which makes all public roads and highways post-routes. It recites facts showing that a portion of Locust street, in the city of St. Louis, is a post-route within the meaning of this statute, and that that portion of said street between Third and Fourth streets was, on or about the year 1880, occupied by the telegraph lines of the American Union Telegraph Company, which lines afterward became, in pursuance of the consolidation already spoken of, the property of the plaintiff. It recites that the plaintiff had, for more than four years prior to the commencement of the suit, occupied and used those lines in its business as a telegraph company; asserts its right to continue in the use of them free from interruption or disturbance; recites facts showing the extensive character of the plaintiff's business in transmitting messages to all parts of the United States, and the importance of such business, not only to individuals, but also to the public authorities of the city of St. Louis,

the State of Missouri and the United States. It then states that more than fifty telegraph wires are strung and supported on the plaintiff's poles on Locust street between Third and Fourth streets; that each one is a conductor of electricity, and would, if brought in contact with any other body charged with a current of electricity, or with any other wire or conductor communicating with any other apparatus generating electricity, necessarily take up and transmit from such other body, or such other conductor, any current of electricity with which the same was charged, or which was being transmitted thereby, and would conduct such electricity into the offices of the plaintiff and into such apparatus of the plaintiff in its offices as are connected with the plaintiff's wires, endangering the plaintiff's property by burning up its telegraph instruments, setting fire to the premises occupied by its main and branch offices, and destroying the lives of its employees.

The petition then recites the incorporation of the defendant for the purpose of supplying light by means of electricity to persons in the city of St. Louis from its premises on number 306 Locust street in said city; describes the manner by which the defendant, for the purpose of producing electric lights generated by means of dynamo electric machines, and transmits by means of wires, powerful and intense currents of electricity.

The petition then states that within the four weeks preceding the institution of this suit the defendant erected three poles on the south side of Locust street, one hundred and fifty feet apart from each other, and higher than the plaintiff's poles, and has strung upon the poles thus erected six wires, four of them directly above and two directly below the plaintiff's wires; that all of the defendant's wires are connected with its dynamos, and are used for the transmission of powerful currents of electricity to various parts of the city.

The petition also states that wires, such as are strung between the defendant's poles, are at all times liable to be

broken, and that it frequently happens (owing to causes which are enumerated) that wires strung between poles so far apart are broken; that, in case the defendant's upper wires are thus broken, they would unavoidably fall on the plaintiff's wires, and in such event it would instantly and unavoidably result that the powerful currents of electricity, generated by the defendant and transmitted through its wires, would be transmitted through one or more of plaintiff's telegraph wires, and be conducted into the plaintiff's office, and to the telegraph instruments and apparatus there employed by plaintiff, to the interruption of the plaintiff's business, and to the imminent danger of its property and the safety and lives of its employees.

The petition further states that the same result would follow in case the plaintiff's wires broke and came in contact with the defendant's wires strung immediately below them; that such accidents have repeatedly occurred and are dreaded by telegraph operators and repairers of wires, causing in many instances death and personal injuries.

The petition also states that the plaintiff has requested the defendant to either remove said wires, or else so place them as to avoid the dangers aforesaid; but that the defendant refuses to comply with such request, and intends not only to continue the use of said wires in the manner aforesaid, but also to increase said dangers by placing additional wires on its poles for like purposes. The petition concludes with a prayer for an injunction restraining the defendant in the use of said wires for the purposes and in the manner aforesaid, and for general relief.

Due notice of the application for a temporary restraining order was given, and it was heard by the court on affidavits filed both in support and in opposition thereof, whereupon the court, upon the plaintiff's giving bond in form and amount required, made a temporary restraining order, enjoining the defendant:

First. From transmitting any electric currents through its wires, strung *below* those of the plaintiff, because the transmission of such currents was dangerous to plaintiff's

employees, and prohibiting the defendant from stringing any more wires below the wires of plaintiff for the use of electric light wires.

Second. From placing for the purposes of its business any electric light wires *above* those of the plaintiff, nearer than *three feet* to plaintiff's wires.

Third. And ordering the defendant to place below its wires already strung some net work or sufficient guard to prevent its wires, in case of breakage or sagging, from coming into contact with the plaintiff's wires.

An order to that effect was served upon the defendant. More than one month after service of this order upon the defendant, the latter filed its answer, accompanied by a motion to dissolve the injunction. The answer consists first of a general denial. It then recites the incorporation of the defendant for the purpose of manufacturing and vending electric light; that its chief office and place of business was, and had for some time been, at the southwest corner of Third and Locust streets, in the city of St. Louis. It states that in order to supply its customers with light it became, was and is, necessary for it to stretch its wires on poles, erected, and to be erected, upon and along the streets of St. Louis, between the southwest corner of Third and Locust streets, the place where its dynamo machines used in manufacturing said light were and are located, and the places of business of its customers where the light was and is supplied for the illumination and lighting of their places of business. It then recites the language of an ordinance enacted by the municipal assembly of the city of St. Louis on the 15th of March, 1884, numbered 12723, "regulating the placing of wires, tubes or cables conveying electricity for the production of light and power along the streets, alleys and public places of the city of St. Louis." This ordinance, which is embodied in the answer, will not be set out in full, but its provisions will be referred to, so far as may be necessary for the purpose of disposing of the questions arising upon this record. The answer next recites that afterwards the board of public improvements of the city of

St. Louis adopted a series of rules and regulations with respect to the matters contained in said ordinance, which rules and regulations are also set out in the answer. These in like manner will be omitted, but their provisions will be referred to, should it become necessary in the course of this opinion.

The answer then proceeds to state that the defendant applied to the board of public improvements for permission to erect its poles and stretch its wires on the north side of Locust street, which permission was denied; that the defendant did obtain the permission of said board to erect its poles and stretch its wires on the south side of Locust street, and did so in strict conformity with the ordinances of the city, and the rules and regulations of the board, and under the supervision and control of the street commissioner; that its wires are stretched in the best practical way, are new and thoroughly insulated by asbestos and fireproof material; that it is impossible for any of said wires to sag or sway so as to touch the wires of plaintiff, and that it is altogether improbable that any of said wires will break in any of the usual weather or condition of the elements in St. Louis.

The answer further states that, if said wires, or either of them, should break asunder and fall so as to come in contact with plaintiff's wires, it would be harmless, as the fracture would necessarily break the current of electricity so that no damage would be done. The answer concludes with a prayer for a dissolution of the injunction, and judgment for costs.

The plaintiff replied, admitting the defendant's incorporation as stated, and the enactment of the city ordinance set out in the answer. The reply disclaimed information of the regulations of the board of public improvements, and of the fact whether the defendant, in what it did, conformed to the provisions of the ordinance, and the regulations of the board, if there were any. The reply further stated that neither the city, nor any municipal officer thereof, had power to authorize defendant to erect and maintain its poles and

wires so as to interfere with the plaintiff's rights under the act of Congress, and averred that the alleged claim of right of the defendant under the statute of this State, the ordinances of the city and the regulations of the board, was contrary to, and a denial of, plaintiff's rights under the act of Congress and the Constitution of the United States.

It must be noticed in this connection that, while the defendant was fully advised both by the plaintiff's petition and by the order of court that it had strung its wires both above and below those of the plaintiff, and was charged with the intention of not only continuing the use of its wires as thus strung, but also of stringing additional wires regardless of any intervening space both above and below, the defendant did not disclaim either in its answer, or in the motion to dissolve, or, as far as the record shows, in the affidavits accompanying it, the intention thus charged.

Upon the final hearing the court modified the preliminary restraining order by removing the restraint as to defendant's lower wires altogether. This decision was not placed on the ground that the operation of such wires, if continued, would be less dangerous to the plaintiff's business or employees than the operation of the upper wires, but upon the sole ground that, prior to the institution of the suit, the plaintiff was advised that these wires were strung merely for a temporary purpose. The residue of the injunction the court modified by enlarging the space which was to intervene between the defendant's and the plaintiff's wires, from three to eight feet. The injunction, as thus modified, was made perpetual.

The defendant assigns for error, in substance, that the court erred in granting to plaintiff a temporary injunction and in making it perpetual, and particularly in restraining defendant from stretching its wires nearer than eight feet to plaintiff's wires, when the evidence failed to show, except by remote inference, any design on part of the defendant to stretch its wires nearer than ten feet to those of the plaintiff.

The city of St. Louis under its charter has power to

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“construct and keep in repair all bridges, streets and drains, and to regulate the use thereof” (sec. 3, sec. 24, clause 2), and, also, to pass all such laws as may be expedient in matters of peace, good government, health and welfare of the city, trade, commerce and manufactures, and to regulate the same.” Clause 14. “The power to regulate the use of streets.” BLACK, J., in *Ferrenbach v. Turner*, 86 Mo. 258, limited to a mere right of way, but it extends to all public uses which the public good and convenience from time to time require, as for laying gas, water pipes, and the like. New uses are constantly arising, and these, and many others, may be made of the streets without the consent of the lot owners. Private rights must yield to them.” In *Julia Building Ass’n v. City of St. Louis*, 88 Mo. App. 477, we held that the dedication or use of public streets in a city does not limit the purpose of passways for persons and vehicles to every use which may advance the public convenience within the legitimate sphere of municipal regulation. This decision was affirmed by the Supreme Court (88 Mo. 258), that court holding that “as the city advances, new uses may be found expedient, and in these cases was the case of a licensee, and not of an adjoining owner. We are, therefore, assuming that there is no substantial difference between the case of a licensee and that of an adjoining owner, and that the rights of each are subject to the same legitimate uses, which the city may make of the streets, even though such uses cause inconvenience to the private rights, long as they do not amount to a substantial invasion of private rights.

If, then, the streets of the city of St. Louis are to be subjected to the servitude which the defendant claims, the power to regulate such a use is directly in violation of the provision of the charter above quoted. The defendant’s claim, which the defendant claims being a proper n

it is equally evident that the power is properly exercised under the charter by the board of public improvements under the ordinance set out. Courts cannot undertake to exercise a general superintendence over this matter, because they possess neither the technical knowledge nor the knowledge of detail which the subject requires, and because the delays, which necessarily attend judicial proceedings, would of themselves furnish a conclusive argument against such exercise. When, therefore, the defendant has shown by its answer and evidence that it has erected its poles and wires in the places and manner prescribed by the municipal authorities, and that the purpose for which the same are used is a proper municipal use to which the street may be subjected, it has made a *prima facie* case, that its occupation of the street to the extent and in the manner aforesaid is lawful, and it is upon the plaintiff to overthrow such case. All this, the defendant has shown by its answer and evidence.

We take these preliminary observations in view of the claim made in the plaintiff's reply, that neither the city, nor any municipal officer thereof, had power to authorize the defendant to erect and maintain its poles and wires so as to interfere with the plaintiff's rights under the acts of Congress. If, by this claim, the proposition is sought to be asserted, that because the plaintiff has occupied the south side of Locust street between Third and Fourth streets with its telegraph wires, it could by such prior occupation exclude the city and its licensees from using said part of the street for other municipal uses, even if by so doing the plaintiff was subjected to some inconvenience, the claim must be denied. If on the other hand by such claim nothing further is sought to be asserted than the proposition that, the plaintiff being a prior licensee on the street, and as such in the exercise of legal rights and duties, its rights could not be substantially invaded by a subsequent licensee of the city, the claim is correct. The plaintiff's rights and duties under national and State laws have

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indeed a material bearing in the determination of the question as to what interference is substantial enough to warrant the interposition of a court of equity, but bearing whatever in determining the exclusive right of the plaintiff's right of occupation. As far as the exercise of the right is concerned, the plaintiff occupies the position of a prior licensee, and as such its right is not of any exclusive character.

The evidence shows that, at the time of the commencement of this action, plaintiff had on the south side of Locust street five telegraph poles, one at the corner of Locust and Third streets, one at the corner of Fourth and Locust streets, and three intervening; that these poles were set at the same distance apart, the distance varying from thirty to sixty feet; that, including the parts which were above the ground, they were forty-one or forty-two feet high; that upon each pole there were four cross-arms, each arm being fifteen or eighteen inches below the top of the pole, and being placed at about that distance apart down the pole; there were eight pins of wood on each cross-arm, for the support of wires, four on each side of the pole; on each cross-arm there was screwed a glass insulator to which the wires were fastened. To the cross-arms were attached about fifty wires, employed by the plaintiff in the conduct of its telegraph business. This business consisted in transmitting messages by electricity, for hire, messages of all kinds, domestic and foreign, parts of the United States, and to foreign telegraph stations.

After the plaintiff had placed these poles and wires in position and use, the defendant, acting under authority from the board of public improvements, was granted to it in pursuance of the ordinance of the city, the defendant's answer, and the regulations of the board of public improvements also there set out — and in compliance with section 10 of the ordinance — erected three poles on the south side of Locust street for the purpose of supporting electric light wires from its dynamos, which were located in the basement of its building at number 3

street. These poles were sixty feet in length, and were inserted seven feet in the ground. The first was erected at the corner of Third and Locust streets, and may be laid out of view, because no electric light wires were attached to it. The second was erected near the middle of the block and near the defendant's building, number 306 Locust street, and the third was erected on the corner of Fourth and Locust streets, a distance of one hundred and twenty-six feet west of the second. These poles were erected substantially in line with the poles of the plaintiff. They rose up through the plaintiff's wires and extended upward much higher than the plaintiff's poles. They were mortised for cross-arms, the mortises beginning a foot below the top of the poles and running, with intervals of less than eighteen inches, three feet below the plaintiff's lowest cross-arms. At the commencement of this action the defendant had stretched four wires from the second of these poles, which stood near the middle of the block, westward to the third, which stood at the intersection with Fourth street. These wires were stretched on the highest cross-arm, and were fourteen or fifteen feet above the highest wire of the plaintiff. The defendant had also stretched two wires running on brackets below the plaintiff's wires. All these wires were copper wires, known in the trade and to electricians as "number 6 underwriter's wire." They were insulated by a covering of cotton, and outside of that a coating of asbestos paint. The testimony tends to show that while this is not a perfect insulator, because there are no perfect insulators, yet it is the best practicable one which had been brought into use. Over these wires the defendant sent powerful currents of electricity to supply certain light to its customers, by means of two electrical machines called dynamos, established in the basement of its building. These dynamos were of unequal power, one of them being capable of generating and transmitting a current of electricity of twelve hundred and fifty volts, while the other was capable of generating and transmitting one thousand volts. The evidence tends to

show that, if a current of the intensity of 60 volts were to pass through the body of a man, it would kill him; that a current of half this intensity in many cases have the same effect; and that if such a current were communicated to one of plaintiff's wires, it would burn the electric instruments with which they were connected, and possibly set fire to the contrivance which plaintiff called the switchboard, with which it was connected on entering its offices; but we do not rely on the testimony as showing that this *would* endanger the plaintiff's employees, engaged in repairing its telegraph instruments, although it *might* produce such a result. Several instruments belonging to the plaintiff were burned by electric light wires coming in contact with telegraph wires; but no damage of this kind resulted from the defendant's wires, which were in use for a comparatively short time. These casualties have arisen from accidental contact between electric light wires and the plaintiff's telegraph wires, where they were in other in very close proximity—but a few instances only. Evidence was given by the plaintiff of two accidents which were probably traceable to currents communicated from electric light wires. One of them was the burning of the Telephone Company's exchange in the fifth story of the Third National Bank Building in the city of St. Louis. The other resulted in the death of one of the plaintiff's employees in the city of Pittsburg. The evidence concerning the two accidents was hypothetically stated to various witnesses, eliciting various opinions and theories. This class of evidence adduced by the plaintiff shows that there is undoubtedly danger, and very considerable damage, from the improper use of electric light wires in contact with telegraph wires, or from a contact between an electric light wire coming in contact with a telegraph wire. That the destruction of plaintiff's wires or the interruption of its business would cause a material interruption of its business was substantially conceded by all the testimony as well as by the plaintiff's employees, in repairing plaintiff's wires.

were liable to come into contact with the defendant's lower wires, and thereby incur great bodily risk.

The decree of the court, it will be perceived, relates entirely to such wires as the defendant may be supposed to have intended to stretch *above* the wires of the plaintiff. As to those which were temporarily stretched *below*, and as to any which the defendant may be supposed to have intended to stretch below, the decree grants no relief. As to any wires of the defendant *above* the plaintiff's wires, the decree contains two prohibitions:

First. Against extending any wires nearer to the plaintiff's wires than eight feet.

Second. Against maintaining any wires above the plaintiff's wires, without placing thereunder a wire net work, or other safe and suitable guard, to prevent defendant's wires from sagging or falling on the wires of the plaintiff, or coming nearer thereto than eight feet.

The dangers which the plaintiff seeks to avoid are threefold:

First. The transmission of powerful currents of electricity from defendant's wires to plaintiff's wires by actual contact, in consequence of the sagging or breaking of the defendant's wires.

Second. The disturbance of the electric current upon the plaintiff's wires, by induction from the defendant's wires.

Third. The dangers to the plaintiff's employees by coming into actual contact with the defendant's lower wires.

Touching the danger of actual contact by sagging, the defendant gave evidence tending to show that it was not its intention to string its wires closer than ten feet to plaintiff's wires from above, and that, with wires strung at such distance, a contact by sagging is next to impossible. It was shown that the defendant's employees, as well as those of the city, were charged with a continuous duty of inspection, rendering such a contact highly improbable. In reply to the argument it may be said that as to defendant's intention the plaintiff had a right to act on appearances, unless otherwise advised, when it applied for the relief.

The defendant's poles, as shown above, were cross-arms at close intervals where they passed plaintiff's wires. While such mortising might be done rather in compliance with the regulations of the municipal board, than with any intention of inserting the cross-arms which might be inserted for other wires, the answer makes no disclaimer of the intention to use them according to appearance. It is of the fact that no such disclaimer was made, that the court, prohibiting the defendant from placing wires nearer than eight feet above those of the plaintiff, tenable on other grounds, was warranted. It is not how the defendant can complain of the decree, since it simply gives a binding effect to the order in that behalf. The question at most is a question of fact which the defendant could easily have avoided by a formal disclaimer.

The danger of contact by breakage, as appears from the evidence, may be caused either by the defendant's wires breaking and falling on those of the plaintiff or by the plaintiff's wires breaking and falling on those of the defendant below. The latter is far more dangerous than the former, since the plaintiff's wires are of slight dimensions and subject to rust, while the defendant's wires are copper, are thoroughly insulated, thicker and stronger. While the danger of the plaintiff's wires is not excluded by the decree, it is doubtful whether such a contingency is sufficient to warrant that part of the decree, which requires a net work or other protection to be placed below the defendant's upper wires to prevent their contact with the plaintiff's wires in case of breakage. On that question hereinafter stated, we need express no opinion. Under the existing facts of this case, the question is as to the form of relief actually granted, but as the plaintiff was entitled to equitable relief by injunction, the decree is not a denial of the institution of the suit.

As to the results which would follow in case

age and contact between an electric light and a telegraph wire, the testimony is far from satisfactory. The expert testimony of the defendant tends to establish the theory that if an electric light wire breaks, the current at once ceases to flow over it, unless the separate parts should fall so as to form two grounds; that if both of the broken wires, not protected by the insulated covering, should touch the ground, the current would continue to flow, but if one end only should touch the ground, the only consequence would be the cessation of the flow of the current from the dynamo. The attention of a number of these witnesses was, on cross-examination, called to occurrences which were testified to by eye-witnesses and which they could not satisfactorily explain on the two-ground theory. It is manifest from all of the evidence that either the theory itself is not thoroughly sound, or else that the conditions which thus bring about the formation of a second ground are so little known, that they constitute a hidden danger which cannot be guarded against. In view of the notorious fact that hundreds of fatal accidents have happened by contact with electric light wires during the comparatively short time they are in use, many of them by breakage, and many of them in this city; and in view of the further fact that such dangers are generally recognized by scientists, it avails little that expert testimony can be found to the effect that the danger is opposed to a certain theory, and, therefore, is nominal and remote. Expert testimony is at most advisory, and its weight is determined by the experience and knowledge, however acquired, which the triers of the fact have of the subject matter under consideration. Weighing the evidence in light of all these facts, we must conclude that, even as to the danger which might arise from a probable breakage of wires, the circumstances at the date of the issue of the restraining order were such as to justify the equitable interposition of the court.

It is in this connection that the plaintiff's rights and duties as fixed by law become material. The plaintiff is a carrier in the service of the public, and its duties as such are regulated by law and enforced by the severest penal-

ties. It is answerable in these penalties for any neglect in the speedy and accurate transmission of messages intrusted to its care. The fact that such messages are delayed or inaccurately transmitted, owing to an interruption of the electric current over its own wires, by causes over which it has no control, may be a defense, but it is one which in many cases it would be impossible for it to establish to the satisfaction of the triers of the fact. The plaintiff, therefore, has a right to insist that a rigid protection of the law should be thrown around the instrumentalities which are essential to the faithful performance of its duties. The defendant is a mere volunteer. It makes whatever contracts it pleases with customers of its own selection, and even in cases of breach is answerable for ordinary damages only.

The argument has been advanced, and has been strongly pressed on our attention, that this danger to the plaintiff's instruments and operators might be avoided by inserting a device known as a fusible plug in the plaintiff's wires, where the same enter into the plaintiff's office. It is shown that such a plug melts if acted upon by an intense electric current, and that the plaintiff, by the insertion of such plugs, might guard against the danger of such intense currents passing by contact from the defendant's wires over its own, and entering its offices to the danger of its instruments and employees. It is evident, however, that such a device, even if it accomplished all that the defendant claims for it, could be only a partial remedy. It might protect the plaintiff's employees and instruments, but it would at the same time cause an interruption of the plaintiff's business by severing its wires at every place where the plug has melted. We must add in this connection, however, that the equity rule, recognized in some of the States, that a plaintiff is not entitled to relief by injunction against a mischief, when he can guard against it at a slight expense, has not met with the approval of our Supreme Court. In *Paddock v. Somes*, 14 S. W. Rep 749, that court approvingly cites the following passage

from Wood on Nuisances (2 ed.) 506: "It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not, prevent damages to his property therefrom is no defense either to an action at law or in equity." The trial court in that case instructed the jury that the plaintiff could not recover, if he could have prevented the injury by a reasonable exertion and at a trifling expense, and its judgment was reversed for error, one of the grounds being the giving of this instruction.

Our statute provides (R. S. 1879, sec. 2722): "The remedy by writ of injunction or prohibition shall exist in all cases where an injury to real or personal property is threatened, and the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action of damages."

Judge HOUGH in *Carpenter v. Grisham*, 59 Mo. 251, says that, even in respect of nuisances, "the modern doctrine of courts of equity is much more liberal than the ancient, and that the rule requiring the right to be first established at law prevails only *where the right itself is in dispute*, or is doubtful," citing High on Injunctions, section 516. Judge HENRY in *State Savings Bank v. Kercheval*, quoting the statute, says: "Would an action for damages here have afforded an adequate remedy, is the question, and not whether the threatened injury would have been irreparable." In *Overall v. Ruenzi*, 87 Mo. 207, Judge NAPTON says: "It is quite apparent that of late years, whether by reason of our statute in regard to injunctions first introduced in the revised Code of 1865, or upon general grounds of expediency, this court has been disposed to regard with favor proceedings which are preventive in their character, rather than compel the injured party to seek redress after the damage is accomplished." So in *Parks v. People's Bank*, 97 Mo. 132, Judge BAROLAY holds that the remedy by injunction exists, even though the plaintiff have a legal remedy, if the remedy is not as full and adequate as that afforded by

injunction. In fact quite a number of decisions, both of the Supreme Court and of this court of late years, whether in view of our statute or for other reasons, have so extended the remedy by injunction, that decisions of English courts and those of other States are of very little value in determining in what cases it does or does not exist.

Upon a review of the entire evidence we find that the case is not one wherein, in the language of some of the courts, the injury is so doubtful, eventual or contingent, as to furnish no ground for relief by injunction. The plaintiff's right is unquestioned, and the evidence shows a fair probability of a substantial interference with that right, so as to justify the plaintiff in invoking the protection of equity before the threatened dangers have culminated. The circumstances sufficiently show that, in the latter event, an adequate remedy would not be afforded by an action of damages. Whether the decree finally rendered is one which should be upheld in all its parts, or whether it might advantageously undergo modifications, is an inquiry which, under existing circumstances, is of a mere speculative character. While we are not officially advised that the conditions under which the decree was rendered have changed from its date, it is a notorious fact, well known to each member of this court, that since said date both the plaintiff's and defendant's buildings and the defendant's dynamos have been destroyed by fire; that the defendant has ceased to do business, and that the plaintiff's main office has been removed to a different street. Under these circumstances, a modification of the injunction would be a mere *brutum fulmen* subserving no useful purpose.

As far as the questions involved in the proceeding are concerned, they have been fully discussed in the opinion; and, as far as the question of costs is concerned, which now seems to be the only question needing adjudication, it is sufficiently disposed of by our holding that the plaintiff was entitled to injunctive relief when the decree was rendered. Without committing ourselves to the propriety of

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the decree in all its parts, if it were still an issue in the case, we are of opinion that justice is best subserved by affirming it. Judgment affirmed; Judge BIGGS concurs; Judge THOMPSON dissents.

NOTE.—See note to next case.

THE CINCINNATI INCLINED PLANE RAILWAY COMPANY v.
THE CITY AND SUBURBAN TELEGRAPH ASSOCIATION.

Ohio Supreme Court, December 2, 1891.

(48 Ohio, 390.)

ELECTRIC RAILWAY AND TELEPHONE COMPANIES.—USE OF STREETS.—
INTERFERENCE.

The primary use for which highways are dedicated is public travel and transportation; consistent with this is their use for new and improved methods of conveyance, including electric railways; but their use for the maintenance of telephone lines, when permitted, is subordinate to and must be exercised so as not to interfere with the rights of the traveling public.

As between a telephone company and an electric railway company, although the former had the earlier franchise and went into earlier operation than the railway, still it obtains no paramount right to the use of the street; and if the operation of the railway interferes with that of the telephone, it is the telephone company which must protect itself by change of methods or equipments.

The telephone company does not, by virtue of its prior grants, acquire a vested and exclusive right to use its system in a particular way, for instance, with a grounded circuit, so that the Legislature cannot subsequently grant an electric railway company the right also to use the earth for its return circuit.

Cases of this series cited in opinion: *Tuggart v. Street Railway Co.*, vol. 3, p. 306; *Hudson River Teleph. Co. v. Watervliet Turnpike & R. R. Co.*, vol. 3, p. 395.

ERROR to the Superior Court of Cincinnati.

Appeal from judgment rendered at General Term, affirming a judgment enjoining, for a period of six months, the

electric railway, defendant below, "from operating any car or cars upon the street railway tracks mentioned in the petition, or any of them, or upon any tracks laid or to be laid upon the Carthage Turnpike, by means of electric currents passing from a wheel or wheels of such car or cars into the rails of such track or any of them, or by means of electric currents, the whole or any part of which may be knowingly permitted to pass into the earth, or for which the earth constitutes any part of the conducting medium, in such manner as to cause injury to plaintiff.

The gist of the plaintiff's petition was that the plaintiff was first on the ground with its telephone equipment, using poles and wires erected and maintained in the streets by statutory authority and under municipal license; and that the defendant had erected in part and was using the single trolley system for the running of its railway, the operation of which interfered by conduction and induction with the plaintiff's telephone business.

The answer denied any exclusive grant to the plaintiff of the right to use the earth for its return circuit. It alleged that the plaintiff could obviate the difficulty by the use of either the complete metallic circuit or the McCluer device; while the defendant could use no such substitute for the ground circuit.

John S. Wise, R. A. Harrison and E. A. Ferguson, for plaintiff in error.

Peck & Shaffer, Aaron F. Perry, H. D. Peck and Selwyn N. Owen, for defendant in error.

DICKMAN, J.: The Cincinnati Inclined Plane Railway Company was incorporated in the year 1871, under the act of May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio." On March 30, 1877, the Legislature passed an act authorizing any inclined plane railway or railroad company theretofore or thereafter organized under the act of

1852, to hold, lease or purchase, and maintain and operate such portion of any street railway leading to or connected with the inclined plane as might be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it held, maintained and operated its inclined plane.

Provided, that no other motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the board of public works in any city having such board, and the common council, or the public authority or company having charge, or owning any other highway in which such street railroad may be laid."

In September, 1885, the Cincinnati board of public works adopted a resolution, consenting

To the use either of electricity, cable or compressed air, as a motive power by the Cincinnati Inclined Plane Railway Company upon the highways in which the street railroads, connected with its inclined plane, and held and operated by it, are laid.

In October, 1888, the railway company, setting forth the resolution giving such consent, and stating that it had decided to use electricity as a motive power on its road, made application to the board of public affairs, the legally constituted successor of the board of public works, for permission to erect along the entire length of its road the poles, wires and other appliances necessary to operate and maintain its entire line from Fifth and Walnut streets to Zoölogical Garden, as an electric road. And thereupon, the board of public affairs, acting under authority of the act of March 30, 1877, and in furtherance of the grant made by the board of public works, granted the application of the railway company, upon the following condition: "1st. The poles to be made of iron of the size and pattern, and the wires to be strung in the manner shown on the plan submitted to this board, and hereby approved."

In February, 1889, in accordance with the provisions of section 8306 of the Revised Statutes, the stockholders of the railway company extended the northern terminus of its

road at the Zoölogical Garden to the village of Glendale. And in March, 1889, the board of county commissioners of Hamilton county, by resolution, granted the application of the railway company to use and occupy the Carthage turnpike to its northern terminus, by double tracks, and with necessary appendages and appurtenances of an overhead electric railroad system, so as to enable the company to permit continuous, rapid and safe transportation between Fountain Square in Cincinnati and the village of Carthage. A provision in the grant provided for the removal by the county commissioners of any and all telegraph and telephone poles which might interfere with the operation of the electric road. This provision, however, was afterwards modified by the action of the commissioners, so as to locate the telegraph and telephone poles at the curb line.

The plan submitted to and approved by the board of public affairs is known as the "Sprague Single Trolley Overhead System." Under the supervision of the engineer of the board, the poles were erected and wires strung; and about the beginning of June, 1889, the railway company had put its street railway in operation under that system, as far as the Zoölogical Garden; and at the commencement of the original action, was engaged in constructing its extension along the Carthage pike under the grant of the county commissioners, with the necessary appendages and appurtenances of the single trolley system.

In the Sprague system, the electricity used to operate the motors under the cars is conveyed to them by a single overhead trolley wire, and a single arm or pole attached to the car and carrying a contact wheel which runs along and presses up underneath the trolley wire. The current passes down the pole or arm to the switch apparatus on board the car, through the motors, thence to the wheels and to the tracks. It then passes back to the station along the iron rails of the track interlaced together by conducting wires, and firmly connected by a conducting wire with the negative pole of the dynamo, the greater portion of the current flowing along this line of the track as the return

current. Some portions of such current, however, are unavoidably diverted through whatever conductors are in proximity and which themselves have grounded circuits, but generally returning to the source in which it originated, by means of the metallic ground connection of the rails as extended by the wire to the dynamo.

The single trolley system is in use on nine-tenths of the railroads in the United States using electricity. As compared with the double trolley method, it is deemed more simple, less liable to disarrangement, much cheaper, and not liable to accidents which would blockade the cars. It has proved successful, and its general adoption, with full knowledge of the double trolley method, furnishes strong proof that it is the most approved system. And, in the finding of facts by the court at General Term, there is nothing in disparagement of the single trolley system in itself, but it is held objectionable because it includes the grounded circuit, which the defendant in error had adopted and claims a monopoly of its use as against the railway company, as an essential part of its telephonic system.

It is evident, therefore, that the railway company derived from the Legislature the right to use on its road other motive power than animals; that it acquired the franchise of using electro-motive power; and eliminating from view the telegraph association, it is making lawful use of such franchise, in a manner authorized by the statute.

The City and Suburban Telegraph Association was incorporated July 1, 1873, as a telegraph company, with lines extending from Cincinnati to Hamilton, in Butler county, under laws since embodied in the chapter of the Revised Statutes regulating "Magnetic Telegraph Companies," and continuing section 3454, which provides:

A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road.

In 1878 the telegraph association became the licensee of the American Bell Telephone Company, with the exclusive right to use all its patents in Cincinnati and certain territory adjacent thereto, and although organized as a telegraph company, entered upon the business of a telephone company. After obtaining the license to use the telephone, the telegraph association erected poles and wires upon the streets wherein the railway of the plaintiff in error is situated, and which was then being operated as a horse railway. These poles and wires were mainly erected in the years 1881 and 1882. But prior thereto, in 1880, the following section was added to the telegraph law :

Section 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone ; and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.

But, without this section making the provisions of the chapter relating to the telegraph companies expressly applicable to the telephone companies, we think that the term "telegraph," as a mode of transmitting messages or other communications, is sufficiently comprehensive to embrace the telephone.

It is thus apparent that while the telegraph association was organized after the incorporation of the railway company, it had planted its poles, and strung its wires, and entered upon the business of a telephone company before the railway company had put its street railway into operation with electricity as the motive power ; that permission, in due form of law, was granted to the telegraph association to place and maintain its poles and wires for the purpose of supplying telephonic communication to its subscribers in Cincinnati and vicinity, and also as a means of communication for its longer lines.

But, it is urged that the franchise of the telegraph association to construct lines of telephone is greatly impaired by reason of the single trolley railway using a grounded circuit, whereby a large part of the electri-

current flows off from the rails to the surrounding earth, and to and upon all telephone wires which may be connected with the earth in proximity to the railway. This action is described as *conduction*, causing more or less of electric current to be poured into the earth and into all electric conductors connected with the earth, thereby reaching telephone wires in a grounded circuit, and creating loud and continuous noises upon the wires, which disturb telephonic communication. This disturbance, however, results not solely from the earth circuit of the railway company, but also from the fact, that the defendant in error likewise relies upon the earth for its return circuit, by connecting with the earth the end of its wires furthest from its electric batteries. The telephone wires are carried from the phones of subscribers to the gas pipes in the rooms where the phones are located, or to water pipes, or to the earth, in order to make a complete circuit. The interference, moreover, with the operation of the telephone, is said to be largely attributable to the delicate mechanism of the telephone wires and phones. The wires, being designed to carry the extremely small current needed for telephone transmission, are too small in size to carry successfully the strong current passing into them from electric railways.

It is claimed, that in addition to this conduction or leakage disturbance, the single trolley electric railway introduces serious disturbances on telephone lines by *induction*, for the reason that such electric railways employ large wires to convey the current used for the propulsion of their cars, and this current is constantly and rapidly changing its strength; that these rapidly changing currents in the electric railway wires induce disturbing currents in parallel telephone wires near which the electric railways have been built, and thus prevent a successful transmission of telephonic messages.

These interferences with the telephone service may be obviated, it is stated, by the railway company giving up the single trolley system with the ground circuit, and sub-

stituting the double trolley system with its two trolley wires, two trolley wheels and electric current passing from one wire through one trolley, through the motor, back through the other trolley to the other wire, and so back to the generator, without escaping to the earth. The grounded circuit, it is insisted, should be abandoned and surrendered to the sole use and service of the defendant in error. But it is admitted that other remedies of the telephone disturbances may be easily obtained by constructing the telephone with a complete metallic circuit, or by resort to what is known as the McCluer device, consisting of a single return wire, to which a number of telephone wires are attached.

Conceding that the mode adopted by the railway company of propelling its cars by electricity is an interruption to the telephone service of the defendant in error, and calculated to impair its franchise in the manner contended, the inquiry is suggested, whether the railway company must yield up a useful franchise that the same may be exclusively enjoyed by the telegraph association, or whether the association shall adapt its system to existing conditions; whether the company shall change from the single to the double trolley system, from the grounded to the metallic circuit, or whether the association shall use either a complete metallic circuit or resort to the McCluer device. It is immaterial on which party the expense of the change may fall the more heavily. It is a question of legal right, and as remarked by Lord HATHERLY, L. C., in *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. Ap. 153, "the simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties; and having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those against whom it is obliged to decide; leaving those parties to relieve themselves as they best can from the position in which they have placed themselves, and if there be no

other mode of escape, to cease to do the acts which occasion the wrong."

When the telegraph association erected its poles and lines in 1881 and 1882, with the design of conducting the business of a telephone company, it found the railway company operating its street railway with authority under the statute to use other motive power than animals, to wit, electricity, cable or compressed air, upon obtaining the consent of the board of public works. The telephone business was not among the probabilities when the streets of Cincinnati, now made use of by the telegraph association, were dedicated or condemned for the public use. The primary and dominant purpose of their establishment was to facilitate travel and transportation; they belong from side to side and end to end to the public, that the public may enjoy the right of traveling and transporting their goods over them. The telephone poles, wires, and other appliances are not among the original and primary objects for which the streets are opened, for they may be placed elsewhere than on the highways, and yet accomplish their purpose. In *Taggart v. Street Railway Company*, 16 R. l. 668, it was said by DUFFEE, C. J., that telephone poles and wires are not used to facilitate the use of the streets for travel and transportation; "whereas, the poles and wires of the railway company are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street cars are propelled." As a general rule, an occupation of the streets otherwise than for travel and transportation, is presumptively inferior and subservient to the dominant easement of the public for highway purposes, for if not so, the primary object of their dedication or appropriation might be largely defeated. And the fact that permission is granted to occupy the streets or highways for a purpose other than travel, does not confer a prior and paramount right to occupy them to the exclusion of their use for travel in a mode different from that obtained when such permission was given.

The main purpose of streets or highways being to facili-

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tate travel and transportation, new and improved agencies for effecting that purpose must be presumed to have been in contemplation, in addition to those in existence when the ways were established. To those improved agencies devised for the convenience and advantage of the community in general, the franchise of the telephone company to occupy the streets for carrying on its business must be secondary and subordinate. "The use of a highway for the purpose of a street railroad involves the application of new appliances and modes of travel, rather than of any new principle. In both, a corporation is employed and invested with rights in the highway; in both, an expenditure of money is required to put the road in a condition for use and to keep it in repair; but in both, the great leading object and public benefit is the accommodation of travelers, who may have occasion to use them at fixed tolls or rates of fare, and not the profits of the proprietors." RANNEY, J., in *Street Railway v. Cumminsville*, 14 Ohio St. 523, 543.

In the case *Hudson River Telephone Company v. The Watervliet Turnpike and Railroad Company*, 121 N. Y. 397, the right of the telephone company to enjoin the railroad company from operating its road by electricity under the single trolley system, incidentally came under consideration. In delivering the opinion of the court, ANDREWS, J., after stating that the use of a grounded circuit is not necessary to a telephone system, and that the substitution of the metallic for the earth circuit, besides obviating the disturbance caused by the defendant's road, would promote the general efficiency of the telephone service, says: "The plaintiff is but one of a large number of telephone companies which, under the general permission of the statute for the incorporation of telegraph companies, have erected poles and strung their wires in the streets of the cities and villages of the State. The claim that under this permissive grant they can exclude the use of the streets by electric railways, or for other street purposes requiring the use of electricity wherever the use of

this agent interferes with the use of the telephone, although the municipality may consent and the public interest will be promoted by the other uses to which the streets are sought to be subjected, needs but to be stated to induce hesitation." In the last entitled case, the telephone company erected poles for its wires, and perfected its system of telephone communication, several years before the rail road company substituted electricity in place of horse power for the movement of its cars.

The authority given by statute to a telephone company to construct its lines from point to point, along and upon any public road, under the continuing prohibition that "the same shall not incommode the public in the use of such road, would plainly indicate an intention on the part of the Legislature that the company shall exercise such franchise with reference to the comfort and convenience of the traveling public, and shall not, in any manner, abridge or impair the use, by the public, of the most approved methods of travel and transportation. And a reasonable interpretation of the statute would lead to the conclusion, that to impair the public enjoyment of an approved method of conveyance on the streets, would be in derogation of the statutory prohibition that the public shall not be incommoded in the use of the roads or highways.

The statutory permission to the telegraph association to construct its telephone lines along and upon the highways, was not, therefore, without qualification. But whether the Legislature had or had not imposed the condition that the public should not be incommoded, the association, in our judgment, acquired its privilege or permissive grant, subject to the duty of so changing and adjusting, when necessary, its system of operating its telephone lines, as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets. Whether all who go on the streets shall have the most convenient and expeditious passage and carriage of persons and goods, has not been made dependent upon the manner

in which the defendant in error has preferred to locate its poles, stretch its telephone wires, or form the electric circuit.

It is in recognition and maintenance of the superior easement of the public in the streets, that city councils are required to "cause the same to be kept open and in repair, and free from nuisance;" that the streets are graded and paved, and proper regulations of police provided to govern the actions of persons using them; that the abutting owner, though having a peculiar interest and easement in the adjacent street, appendent to his lot, has no right to place permanent obstructions in the street, or do any act on his own land, outside the limits of the street, that will make the way inconvenient or hazardous, or less secure than it was left by the municipal authorities. *Crawford v. Delaware*, 7 Ohio St. 459; *Elliott on Roads*, 311; *Mallory v. Griffey*, 85 Penn. St. 275; *Milburn v. Fowler*, 27 Hun (N. Y.) 568; *Dillon's Mun. Corp.*, sec. 1032, and cases there cited.

In *The King v. Russell*, 6 East, 427, the right of the owner to load and to unload his wagons in the highway before his warehouse was held to be entirely subordinate to the right of public passage, and must not be exercised in such a manner as unreasonably to abridge or incommode the latter right. The court say: "The primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance. If the nature of the defendant's business were such as to require the loading and unloading of so many more of its wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot." As against the public easement in the highway, a telephone company that obtains the naked permission to locate its poles and wires along the streets, should, we think, stand on no higher vantage ground than the owners of property abutting on the streets, who hold or acquire their property subject to all the consequences which

may result, advantageously or otherwise, from any public and authorized use of the streets, in any mode promotive of, and consistent with the purposes of establishing them as common highways.

This paramount easement or estate which the public acquires in the streets, carrying with it a special interest in the adoption of the most approved systems of modern street travel, cannot be made subservient to the telegraph or telephone when admitted on the highway, without the clearest expression of the legislative will. In *Hickok v. Hine*, 23 Ohio St. 523, it was held that when the Legislature has power to require one public easement to yield to another more important — *a fortiori* where the other is inferior — the intention to grant such power must appear by express words, or by necessary implication; and such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. We fail to discover any authority, either express or implied, to subordinate the public easement in the streets to the privileges exercised thereon by the telegraph association, under the general terms of the statute permitting the erection of posts, piers and abutments necessary for its telephone wires, and especially when coupled with the condition, that the same shall not incommode the public in the use of the highway.

The demand made by the telegraph association is, not that the railway company shall so modify its existing electrical apparatus as not to interfere with the telephone service, but shall forever abandon the use of an essential part of its electro-motive system, or be perpetually enjoined. In other words, the association claims the exclusive use of the grounded circuit, inasmuch as the mechanism of the telephone is so complex, and the electric currents employed so delicate and sensitive, that they cannot be used without disturbance from the heavier currents employed by neighboring electrical enterprises that operate with the grounded circuit. We find no foundation for such an exclusive franchise or right. When the telegraph association began its

operation under the telephone system, neither the statute authorizing it to erect and maintain poles, wires and other necessary fixtures, nor the ordinance under which it obtained the power to extend its lines in the streets, gave any exclusive right either to use the earth for a return circuit, or a complete metallic circuit formed by double wires. The Legislature did not grant the right by general enactment, nor was the municipal corporation empowered by the Legislature to give the telegraph association the exclusive right to make use of its streets so as to create a monopoly. In *State v. Cincinnati Gas Light and Coke Co.*, 18 Ohio St. 262, it was held that a municipal corporation cannot, without clear legislative authority, grant an exclusive right of the streets for certain purposes to an individual or corporation. To enable it to grant such an exclusive right by ordinance in the nature of a contract, the power must be shown to have been expressly granted or to be so far necessary to the proper execution of the powers which are expressly granted, as to make its existence free from doubt.

In the year 1838, Professor Steinheil made the important discovery of the practicability of using the earth as one half, or the returning section of an electric circuit. Professor Morse claimed to have made the discovery about the same time, but he failed to obtain a patent therefor. It was the discovery of an elementary principle of science, of a truth in physics, of a law in the operation of the forces of nature, and was not bounded by the trammels of the patent law. For forty years before the telephone was discovered, the use of the earth as a conducting medium in the formation of an electric circuit had been the common property of all electric enterprise. By what grant or title, then, did it become the special, peculiar and exclusive franchise of the telegraph association? As it did not originate in legislative or municipal grant, so, such exclusive franchise did not spring from priority in its exercise. Where a right is common and universal, and capable of being exercised by all at the same time, there is no applicability

of the rule, that he who in its enjoyment is prior in point of time is prior in right. He who is first in the field does not thereby gain a monopoly of use.

It is contended, however, that the defendant in error, by virtue of its grants, acquired, before the railway company had a right to use electricity as a motive power, a vested interest in the telephone system as it now operates it, with a grounded circuit, and that not even the Legislature of the State could take away from it or injure this franchise, on the faith of which it has expended its capital and labor. Special privileges or immunities are under the control of the Legislature. If granted, they may be altered, revoked or repealed by the general assembly. Art. 1, sec. 2, of the Constitution. And while corporations with valuable franchises may be formed under general laws, all such laws may, from time to time, be altered or repealed. Constitution, art. 13, sec. 2. In view of these constitutional provisions, it is clearly within the power of the general assembly to authorize one class of corporations to use in the streets, electricity with the grounded circuit, as a motive power, and another class to employ the same or a similar agency for the transmission of telegraphic or telephonic messages. And, if the proper exercise of the rights granted to one class under general law is irreconcilable and plainly interferes with a prior grant to a corporation of the other class, it may be construed as the intention of the Legislature to deny an exclusive franchise, if not to repeal the antecedent grant.

In considering the advantages conferred upon them by the grant of their corporate rights, it is evident that the primary object or design of the State in granting the franchises of telegraph and telephone companies is, in a large measure, to subserve the public benefit and convenience, and not the mere pecuniary advantage of the owners of the corporate property. The exercise of their corporate privileges is subordinate to the accommodation of those who travel on the streets or highways, "the profit of the proprietors being a mere mode of compensating them for their

outlay of capital in providing and keeping up the public easement." SHAW, C. J., in *Commonwealth v. Temple*, 14 Gray, 69, 77. It is in contemplation of such companies being thus subservient to the promotion of the public convenience and welfare, that the Legislature has granted to them the privilege, among others, of exercising the power of eminent domain, by entering upon any land, and appropriating so much thereof as may be deemed necessary for the erection and maintenance of poles, piers, abutments, wires and other necessary fixtures.

Having received their corporate franchises from the State, they hold them in implied trust for the benefit of the community at large, and subject to the constitutional grant of legislative power to control the exercise of those franchises in the future as the public good may require. A franchise, if granted by the State with a reservation of a right of repeal, must be regarded as a mere privilege while it is suffered to continue, and the Legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchise granted to them, solely upon the faith of the sovereign grantor. *Pratt v. Brown*, 3 Wis. 603; *Cooley on Const. Lim.*, 472 (6 ed.). But in the absence of such reservation, its force and effect may be attained through the constitutional power vested in the general assembly to alter or repeal from time to time all general laws under which corporations are formed, and to alter, revoke or repeal all special privileges or immunities that may have been granted.

In illustration of what we have said is the case, *Railway v. Railway*, 30 Ohio St. 604. In that case the Lake Shore and Michigan Southern Railway Company instituted proceedings to appropriate, for the construction of its railroad, the right and privilege of crossing with its track and way the track and way of the Cincinnati, Sandusky and Cleveland Railroad Company. It was the decision of the court, as set forth in the syllabus, that every railroad corporation in this State accepts its charter and franchises, and owns and uses its tracks, subject to the power of the

State to authorize the construction of other railroads across its tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right. Under the Constitution and laws of this State, the right of one railroad corporation to cross the track of another in constructing and operating its road is derived by grant of the franchise so to do from the State, and not by purchase or appropriation from the road first located and constructed. *The latter has no vested exclusive right to such crossing for its use, against the right of the public to a crossing.* The court further held that the railroad company, across whose track a right of way was condemned, could not recover for an injury to its franchise as a railroad; and that detention of trains, loss of future business, or additional expenses incident to the future exercise of its corporate powers, could not be taken into the account in estimating consequential damages.

It is contended, however, in behalf of the defendant in error, that conceding the railway company and the telegraph association to be upon an equal footing on the streets and highways in the enjoyment of their respective franchises, the company is bound to conform to the rule *sic utere tuo ut alienum non laedas*. In the view which we take of the relation to each other of the parties to the action, we deem it unnecessary to inquire whether there has been a want of conformity, and to what extent, if any, on the part of the railway company, to the requirements of the legal maxim. Nor do we think it necessary to inquire how far the company making a lawful and careful use of its own property, or of a franchise granted to it by the proper municipal authorities, may be held liable for *damages* incidentally caused by the association.

From the undisputed facts in the case, as disclosed in the record and printed arguments of counsel, it is evident, as we have already seen, that the railway company acquired from the State and from the city of Cincinnati, authority to erect and maintain poles and wires in the streets or high-

ways, and to use electricity as a motive power for its cars. Clothed with such authority, we have, upon weighing the allegations in the original petition, and applying to them the well settled principles governing the legal rights of the public in the highways, reached the conclusion, that the facts set forth in the petition are not sufficient to constitute a cause of action. We are of the opinion that there has been no invasion of the rights of the telegraph association by the plaintiff in error, and that the telegraph association is not entitled to the relief prayed for in its petition. The judgment, therefore, of the Superior Court at General and Special Term must be reversed, and the original petition dismissed.

Judgment accordingly.

NOTE.—The foregoing ten opinions, with three in previous volumes, discuss in various aspects the respective rights of different users of the electrical current in respect to the occupation of public streets for its transmission. In two cases the plaintiff was a telegraph company; in all the others, telephone companies. The defendants in two cases were electric light companies; in all the others, electric street railway companies. The burden of the complaint in each case was that the powerful currents of electricity required by the defendant threatened injury to the plaintiffs chiefly by conduction, induction, injury to and destruction of delicate apparatus; also personal injury to employees, &c. The remedy in each case was sought by injunction; and in most of the cases it was denied, or if granted, it was with such modification as to cause the defendant little annoyance. Thus, in *W. U. Tel. Co. v. Champlain Elec. Lt. Co.*, 1 Am. Elec. Cas. 822, the injunction was granted only to the extent of forbidding the defendant's wires to be placed nearer the telephone wires than the defendant alleged by its answer that it intended to place them.

The grounds of denying the relief sought have been various: In *East Tenn. Teleph. Co. v. Chattanooga St. Ry. Co.*, 2 Am. Elec. Cas. 828, and in *Rocky Mt. Bell Teleph. Co. v. Salt Lake City Ry. Co.* (first decision), *ante*, p. 850, the only ground stated was insufficient proof of irreparable injury.

In *Cent. Un. Teleph. Co. v. Sprague Elec. Ry. & Co.*, 2 Am. Elec. Cas. 807; *Rocky Mt. Bell Teleph. Co. v. Salt Lake City, &c. Co.* (second decision), *ante*, p. 856; *Wisconsin Teleph. Co. v. Eau Claire St. Ry. Co.*, *ante*, p. 888; and *Cumberland Teleph. & Tel. Co. v. United Elec. Ry. Co.*, *ante*, p. 408, the decision was put upon the ground that the more efficient remedy was in the hands of the plaintiff, who should therefore apply it. In the first General Term decision of *Hudson River Teleph. Co. v. Watervliet, &c. Co.*, *ante*, p. 887, the same fact was found, but a temporary restrain-

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ing order granted until some stipulation should be made about the expense of adopting the remedy. In the *Cumberland Teleph. Co. case*, it was held that the telephone company should pay such expense.

In the following cases streets was laid, more or less forcibly, upon the proposition that the electric railway is, while the telephone is not, a proper street use. *Rocky Mt. Bell Teleph. Co. case* (second decision); *Wisconsin Teleph. Co. case*; *East Tenn. Teleph. Co. case*; *Cincinnati Inclined Plane Ry. Co. v. City & Suburban Teleph. Assn.*, ante, p. 448.

In several cases it has been held that the fact that one company was first and properly in the occupation of a street or of a particular side of it, does not entitle it to an exclusive right or privilege. Such are *Bell Teleph. Co. v. Bellville Elec. Lt. Co.*, 2 Am. Elec. Cas. 880, note; *Cent. Un. Teleph. Co. v. Sprague Elec. Ry., &c. Co.*; *Rocky Mt. Bell Teleph. Co. case* (second decision); *W. U. Tel. Co. v. Guernsey & Scudder Elec. Lt. Co.*, ante, p. 425; *Cincinnati Inclined Plane Ry. Co. case*; *East Tenn. Teleph. Co. case*. In *Nebraska Teleph. Co. v. York Gas, &c. Co.*, ante, p. 864, the fact that the defendant was first in the field was one of the reasons for which an injunction was refused.

On the other hand, the rule that one must so use his own property or rights as to injure another as little as possible, has been often expressly or forcibly recognized as applicable to this class of actions. Thus in the *Bellville Elec. Light Co. case*, the danger complained of appearing to be imminent, the defendant was restrained by injunction from using the same side of the road with the plaintiff. See also the *Guernsey & Scudder Elec. Light Co. case*.

See note, vol. 2, p. 210.

**AMOS CHAFFEE V. THE TELEPHONE & TELEGRAPH CON-
STRUCTION COMPANY.**

Michigan Supreme Court, Nov. 15, 1889.

(77 Mich. 625.)

ELECTRIC WIRES INTERFERING WITH FIREMEN.—NUISANCE.

Though a person may at any moment move to abate a nuisance maintained upon his premises by an intruder, still if he acquiesce in and derive benefit from it, he cannot recover damages because of its maintenance. So held, that the plaintiff who had erected a building beside electric poles and wires maintained upon his land by the defendant, and allowed the poles and wires to remain there without protest or demur for years, and permitted a tenant to use one of the wires for business purposes in his building, could not, when a fire arose, and the poles and wires were found to hinder the firemen in their work of extinguishing it, hold the defendant liable for the loss occasioned by the fire.

ERROR to Wayne county. Appeal by plaintiff below.
Facts stated in opinion.

Otto Kirchner, for appellant.

William H. Wells (*Ashley Pond*, of counsel), for defendant.

MORSE, J.: Plaintiff was the owner of lot 73, in section 2 of the governor and judges' plan in the city of Detroit, and of a valuable brick building thereon that yielded a monthly rent of \$250. It was situated on the south side of Larned street west, in the block bounded by Larned street and Jefferson avenue on the north and south, and by Griswold and Shelby streets on the east and west, respectively.

The block was intersected by an alley 20 feet wide running between Jefferson avenue and Larned street, from Griswold street westerly to Shelby street. The defendant put up and

maintained 60 wires, stretched on cross-arms, each 6 feet long, attached to poles planted in the ground (8 to each pole), through said alley, in the rear of plaintiff's building. There were also 12 telegraph wires stretched through said alley by another company.

On March 2, 1888, a fire broke out in the building, and everything burned, except the walls. Some of the brick walls were not damaged so as to require them to be taken down, but a part of them were. It is claimed that these wires prevented the fire department from extinguishing the fire. Mr. Tryon, the secretary of the fire department, testified, as did Mr. Elliot, the assistant chief engineer, that on account of these wires it was impossible for the firemen to raise the ladders, which were on trucks. Mr. Tryon, some time before the fire, notified Mr. Phillips, the manager of the defendant company, that these wires in the alley would prevent the fire department from raising its ladders in the event of a fire. Mr. Phillips replied that this was undoubtedly correct, but that the defendant company were preparing to get their wires underground, and that they would strip that alley as soon as possible — probably the first thing they did. When the firemen first reached the premises the fire was in the third story. Evidence was given on behalf of the plaintiff tending to show that if it had not been for these wires the first and second stories of the building could have been saved intact, except the damage from the water thrown on the fire.

The plaintiff sues in trespass on the case, claiming damages, and contends:

1. That the alley was a private way appurtenant to his lot and building.

2. That the erection of the wires by defendant in the alley was a trespass, and their maintenance a nuisance, every continuance of which was a new nuisance.

3. That, in contemplation of law, defendant, by its wires, was at the fire, and by force and arms prevented its extinction, and in so doing was the direct and immediate cause of the destruction of plaintiff's building.

The defendant claims :

1. That the defendant was not unlawfully maintaining the wires in the alley.
2. The act complained of was not the proximate cause of the loss.
3. The damages sought to be shown by the plaintiff's testimony are vague and speculative.

The first contention of the defendant is based upon the long acquiescence of the plaintiff in the maintenance of the wires in the alley.

The circuit judge before whom the case was tried, Hon. CORNELIUS J. REILLY, of the Wayne Circuit Court, at the close of the testimony directed a verdict for the defendant.

In the view that I take of the case, it is not necessary to discuss much of the evidence, or any point in the case save the first plea of the defendant. The evidence is uncontradicted that the building was erected five years before the trial of the suit. Before the erection of the burned building the lot was occupied by a dwelling-house, which had been there a great many years.

The plaintiff testified that the wires were placed there "a good while ago, and were there when the brick building, which was burned, was erected."

He knew the poles were there, and what the wires were used for.

"I asked no questions about it. From the time I first knew the wires were there, I understood what they were for."

He never asked the defendant to remove them, nor protested against their maintenance in the alley, nor in any way manifested any dissent to the action of the defendant in keeping and using them there. He testifies that one of his tenants used a telephone in his building, and says :

"I never objected, or found fault with the defendant company for maintaining their wires in the alley."

I can see no legal or equitable reason why the plaintiff, tacitly assenting to the maintenance of the wires in this alley, by allowing his tenant to use a telephone connected

therewith, and by permitting them to remain there without the least objection, should be allowed, after this fire, to place the damage, or any part of it, upon the defendant, nor can I find any law to sustain his action. It is contended by the counsel for plaintiff that the maintenance of the wires in the alley was a nuisance, and a continuing one from day to day, each continuance being a new nuisance; that the defendant was liable to the plaintiff in an action at law for the obstruction of the alley every day, up to and including the day of the fire; and that therefore the acquiescence of the plaintiff for one or more days cannot be used to infer an implied license for its continuance another day. The following cases are cited to support this contention: *Reid v. City of Atlanta*, 73 Ga. 523; *Gray v. Gas Light Co.*, 114 Mass. 149; *Railroad Co. v. State*, 20 Md. 157; *Pettis v. Johnson*, 56 Ind. 139.

These cases do not meet the question presented here. Failure to protest against a nuisance for a long space of time will not prevent an action to abate it, upon the principle that each day of its continuance is a new nuisance; and many courts hold that the right to maintain a nuisance can never be gained by prescription. But I can find no authority anywhere, and I should doubt its being good law if I did find it, that will permit a man to build by the side of these telegraph and telephone poles and wires, without any protest or demur whatsoever against their standing there, when they are on his own land, and go on for years, without finding any fault whatever, and allowing a tenant to use one of the wires for business purposes in this building, and then, when a fire arises and the poles are found to hinder the firemen in their work of extinguishing it, charge up to the corporation maintaining these poles the loss occasioned by such fire. To do this would be to violate one of the plainest principles of justice; and the law, in my opinion, will not permit it. I do not doubt the right of Mr. Chaffee to have moved at any moment to abate this nuisance, but while he acquiesced in it, and virtually was

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using it, or deriving some benefit from it, through a tenant in his building, he cannot be permitted to recover damages because of its maintenance upon his premises.

If there can be any assent which is not shown by express words, the plaintiff assented to the continuance of these poles upon his premises, and such assent was not a question for the jury. It was shown without dispute by his own testimony. There was clearly, to my mind, an implied assent that the poles might remain there, and no hint anywhere, not even in his testimony on the trial, that he ever considered them a nuisance until they were demonstrated to be so by the fire. Until something was done by Chaffee to notify the defendant that he found some fault with the maintenance of these poles in the alley, he could not recover damages for their being there.

The judgment was right, and must be affirmed.

SHERWOOD, C. J., CHAMPLIN and LONG, JJ., concurred with MORSE, J. CAMPBELL, J., wrote dissenting opinion.

NOTE.—See note to *Williams v. Louisiana Elec. Lt. & Power Co.*, post.

GEORGE WILSON V. GREAT SOUTHERN TELEPHONE &
TELEGRAPH COMPANY.

Louisiana Supreme Court, Nov. 18, 1889.

(41 La. An. 1041.)

TELEPHONE COMPANY.—OBSTRUCTION IN STREET.

A license from municipal authority to a telephone company to erect poles in streets and secure them in place does not free the company from liability for damages due to its negligence in so placing guy wires to secure its poles as to endanger the traveling public.

Although a portion of a street be by municipal ordinance forbidden to carriages, a telephone company is not thereby authorized to maintain dangerous erections there.

A verdict in favor of the driver of a fire engine, who in his haste to arrive at a fire drove upon such forbidden ground, and came in contact with guy wires negligently placed there, thus receiving the injuries complained of — sustained.

APPEAL from Civil District Court, Parish of Orleans.

Bayne, Denegre & Bayne, for defendant and appellant.

B. R. Forman, for plaintiff and appellee.

McENERY, J. : The plaintiff sues the defendant company for \$10,000 damages, for injuries sustained by a guy wire erected for the purpose of supporting the posts of said company. He alleges that the wire was erected and maintained by the defendant company with gross carelessness and negligence, so as to be dangerous to the lives of people using the public highway, and that said guy wire was placed at a less distance from the ground than required by the city ordinance.

The answer of the defendant is a general denial, and avers that, if the plaintiff suffered any damage, that the same was due to his own negligence and carelessness. The case was tried by a jury, and there was a verdict in favor of the plaintiff for \$1,750, upon which judgment was rendered, from which the defendant company appeals.

The guy wire had been erected about three days before the accident to plaintiff, in order to sustain and strengthen the posts of the defendant company, placed on the neutral ground on St. Charles avenue. The posts are situated about three feet six inches from the street, and the guy wire was some six or seven feet above the ground, not high enough to be clear of vehicles passing on the neutral ground. Outside of the asphalt pavement, and inside of the neutral ground, about three and a half feet from the edge of the pavement, there was located a fire plug, where the accident occurred.

The plaintiff was the driver for an engine company, and on the 21st of July, 1888, between 1 and 2 o'clock A. M.,

an alarm of fire was sounded, and he was driving his engine to the fire. He was proceeding along St. Charles avenue at the usual speed with which fire engines travel to a fire. He passed the fire plug, where an engine would supply itself with water to play upon the fire in the neighborhood. In attempting to turn his engine, which had passed the fire plug only a short distance, it partly went on the neutral ground. The driver, the plaintiff, was struck by the guy wire, and severely, if not seriously, injured.

The telephone and telegraph company had the undoubted right to erect its poles and to secure them. But this permission does not authorize them to put them up, and to secure them by wires strung so as to endanger human life. The city ordinances forbid the use of the neutral ground on St. Charles avenue to carriages and other vehicles; but this prohibition did not authorize the defendant company to erect its wires so as to injure any one who might be trespassing upon the neutral ground. No one, even to protect himself against trespassers, has a right to erect death traps on his premises. The posts were placed in dangerous proximity to the street, and ordinary prudence, and a due regard for the safety of the public, would have dictated that the guy wires should be placed beyond the possibility of injuring any one. *Hooker v. Miller*, 18 Am. Rep. 18.

A person using the street without any intention of violating the city law, might by accident be driven with a vehicle on the neutral ground. In a case of that kind, it would hardly be considered that he contributed to his own accident if he should be injured by the wire.

In the instant case the plaintiff was engaged in a lawful and a laudable purpose. There is a commendable rivalry among firemen as to who shall arrive early, and do the first service. This has been often encouraged; and on the approbation of the public, it has become the unwritten law of the city to that extent, that what might be considered furious driving under ordinary circumstances is regarded with favor and without penalty.

The evidence shows that the engine driven by plaintiff

could not turn in less than thirty-five feet space. The plaintiff had slackened his pace and was with deliberation getting his engine in position, when he encountered the defendant's wire and was injured. The fire plug was placed for use in its position on the neutral ground. It was the plaintiff's duty to go to it with as little delay as possible. He exercised reasonable care in approaching it. We fail to ascertain from the record that he contributed by his negligence to the accident.

* * * * *

[FENNER, J., dissented upon the ground that the defendant's telegraph poles and guy wires being located on neutral ground, and placed there under competent legal authorization, the guy wires being essential to the support of the poles, and the place not being a highway for horses and vehicles, which were prohibited by law from passing thereon — the defendant was not bound to provide against injury resulting from such use.]

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J.: The defendant company claims the right to erect such piers, poles, abutments, constructions, etc., as might be necessary, under the provisions of act 124 of 1880, p. 168, which is a general statute; but a reference to that legislation shows that whatever be the privileges it accords to the corporations mentioned, they are coupled with the *proviso* that the ordinary use of the ways through which the same may be exercised shall not be *obstructed*.

By being allowed the right of using the neutral ground for their purposes, the company was not, therefore, permitted to obstruct the same, but, on the contrary, was bound not to interfere with its ordinary uses; one of which, as is testified to, was to be driven across in case of necessity, for the extinguishment of fires.

It will not do to say that the city ordinances have prohibited the use of the middle ground to horses and vehicles, and, therefore, that the crossing, in the circumstances mentioned in the opinion, was illegal.

The ordinances referred to general and continual uses, and in no way to special and accidental uses, demanded for public safety.

It is error to suppose that the company would have done as it pleased in relation to its poles and wires on that middle ground, without any control by law, or regard to the rights of others. The company did not become the owner to any extent of that ground, which is public property, and the title of which could not be, and was not, divested in its favor.

Even had the company something of a real right on or to the same, its negligent action, which has entailed such grievous injury on the plaintiff, could not on that account be excused.

It is written in the law, in emphatic language: "Although a proprietor may do with his estate whatever he pleases, still, he cannot make any work on it which may deprive his neighbor of the liberty of enjoying his own, or which may be cause of damage to him." R. C. C. 505, 667.

Hence the maxim: *Sic utere tuo, ut alienum non laedas.*

The company ought to have foreseen possible injury by laying the guy wire as it did. It is in fault *ab initio*. It could have laid it higher, so that, happening the occurrence which has taken place, no injury would have resulted.

FENNER, J., adheres to his original dissent.

NOTE.—See note to *Williams v. Electric Light and Power Co.*, post.

ROBERTS V. WISCONSIN TELEPHONE COMPANY.

Wisconsin Supreme Court, Oct. 14, 1890.

(46 N. W. Rep. 800.)

TELEPHONE POLES.—OBSTRUCTION OF HIGHWAY.

In an action against a telephone company for personal injuries caused by collision with a pole in the highway, it appeared that the company had the right to place its poles in the highway, provided it did not obstruct the public use; and that the poles were so placed that it was improbable that any but a runaway horse would come into collision with it; and that the plaintiff's horse was running away at the time of the collision. Held that a complaint setting up these facts, in addition to the fact of injury, contained no cause of action.

"Telegraph" in a statute includes "telephone."

Case of this series cited in opinion: *W. U. Tel. Co. v. Oshkosh*, vol. 1 p. 687.

APPEAL from Circuit Court, Dane county.

Facts stated in opinion.

Finches, Lynde & Miller, for appellant.

Lewis, Pfund & Briggs, for respondent.

COLE, C. J.: This is an action for personal injuries. It appears from the complaint that the plaintiff was riding with another man in a buggy along the highway, which was almost perfectly level, and without any banks, borders, ditches or rough or uneven places, or obstructions of any kind in it, except telephone poles, which were set in the highway eleven rods apart, and about four or six feet south from the fence on the north side thereof. There were three traveled tracks about equally used by the public for traveling. The track on the north side of the highway was about eight feet from the fence on the north side of said highway, and about

three feet from the telephone poles. The team was traveling on this north track, and it is alleged the horses were gentle and tractible, and were under the control of the driver when they were stopped to enable the plaintiff to get out of the buggy. While in the act of alighting from the buggy the horses were frightened by a team coming from behind, and ran along the highway coming in collision with a telephone pole, and the plaintiff was thrown forward from the buggy, in which he had regained his seat, and was endeavoring to stop the horses, and sustained the injuries of which he complains. Now, does the complaint state a cause of action? It appears to us that it does not. The only act of negligence complained of on the part of the defendant is the placing of the telephone poles in the highway where they were set. These poles, as we have stated, were set from four to six feet from the fence on the north side of the highway, which would leave just room enough to permit the cross arms on the poles to be entirely over the highway. Was it lawful to place these poles in the highway? The statute authorizes any corporation formed to build and operate telegraph lines or conduct the business of telegraphing to construct and maintain its lines, with all necessary appurtenances, along a public highway. Section 1778, Sanb. & Ann. St. And in *Telephone Co. v. City of Oshkosh*, 62 Wis. 32 (21 N. W. Rep. 828), it was held that the statute included telephone companies, although such companies were not specifically mentioned therein. The poles then were not unlawful structures in the highway, but were authorized by law to be set therein. It is true the statute in effect declares that no telephone line or any appurtenance thereto at any time obstruct or incommode the public use of the highway. Assuming the facts as to the location of the telephone poles to be as alleged in the complaint we think they did not show any actionable negligence. They would certainly constitute no obstruction to the use of the highway, nor would the team have collided with them if it had been under the control of the driver, and properly managed. It was the fright and

unmanageableness of the horses which was the real cause of the accident. If the horses had not run against the pole they probably would have run into the fence, and caused injury to life or property. For, as observed by the defendant's counsel, it is impossible to so arrange the highway that it will be safe for a runaway team to speed upon it. And this court has said that "it is not the duty of towns to provide roads which shall be safe for runaway or unmanageable horses, or such as have escaped from the control of their drivers, without the fault of the towns, and where injuries are sustained under such circumstances, it appearing that otherwise they might not have been sustained, the loss must fall upon the owners whose misfortune, if not whose fault, it is that they so happened." *Jackson v. Town of Bellevue*, 30 Wis. 250-258. It is stated in the complaint that the highway where this accident occurred was perfectly level, with no ditches or rough or uneven places in it, there being nothing within the entire width to prevent a team from passing over it in safety, except the telephone poles set near the fence. These poles could not have been placed nearer the fence without encroaching upon the adjoining property. They seem to have been set with due care, and it is plain that they did not and could not have obstructed or incommoded the public use of the highway. We feel constrained to so hold upon the facts alleged.

The plaintiff's counsel suggests that the question whether the telephone poles incommoded the public use of the highway was one for a jury to determine. That certainly is not the correct view where a question of law is raised by demurrer. It is for the court then to decide whether, the facts being submitted, a cause of action is stated. Of course the defendant confessed the facts to be alleged, but denies that by the law arising on the facts the plaintiff should recover any damages. So here the court must say whether the defendant, by setting its telephone post in the place and manner described, was negligent, or was guilty of a breach of legal duty. We are clearly of the opinion that no actionable negligence is shown. The team could

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have passed along the highway in safety if the horses had not taken fright at the team coming from behind, and become unmanageable. That the horses ran against or struck the telephone pole was the fault or misfortune of the driver. The demurrer to the complaint should have been sustained. The order overruling the same is reversed, and the cause is remanded to the Circuit Court for further proceedings according to law.

NOTE.—See note to *Williams v. Electric Light and Power Co.*, post.

JEROME W. STARING, Respondent, v. THE WESTERN
UNION TELEGRAPH COMPANY, Appellant.

New York Supreme Court, General Term, Fourth Department, Nov. 20, 1890.

(34 St. R. 508 ; 11 N. Y. Supp. 817.)

WIRES IN STREET.—RIGHTS OF THE TRAVELING PUBLIC.

The right of a telegraph company to the use of a highway for the purpose of constructing, maintaining or removing its telegraph line is subject to the use of the traveling public. It has no right to use the highway so as to obstruct it or render it dangerous to public travel.

So held, in a case where the plaintiff sued for damages due to his horse being frightened by telegraph wires which were being removed from defendant's poles.

Complaint held sufficient to warrant recovery, and the submission to the jury of the questions of wrongful obstruction of the highway and negligence of the defendant and absence of contributory negligence of the plaintiff, held proper.

Case of this series cited in opinion : *Sheldon v. W. U. Tel. Co.*, vol. 2, p. 299.

APPEAL from a judgment rendered at Chemung county, on the verdict of a jury, and from order denying motion for new trial, made on case and exceptions.

Jacob Schwartz, for appellant.

Frederick Collin, for respondent.

MARTIN, J.: The plaintiff in his complaint alleged that as he was driving upon a public highway in the town of Elmira, N. Y., the defendant, while engaged in removing the telegraph wires from its poles (which were set along such highway), negligently, wrongfully and unlawfully attempted to throw one of its wires over the plaintiff, his horse and wagon, while he was on said highway, and in doing so negligently, wrongfully and unlawfully struck the horse with the wire, and also at the same time negligently, wrongfully and unlawfully struck the plaintiff's wagon, and thereby frightened his horse and caused him to run away and greatly injure the plaintiff. A careful examination of the evidence shows that it was sufficient to justify the jury in finding the facts alleged.

The court submitted to the jury the question whether the highway where the accident occurred was wrongfully obstructed by the defendant, and charged that if the plaintiff's injury was caused by such obstruction, and he was free from contributory negligence, he was entitled to recover. The court also charged: "If you find from this evidence that in consequence of the carelessness or negligence of this defendant, this plaintiff has been injured, and that injury has been caused without any contributory negligence on his part, and you come down to the question as to how much damage he has sustained, you will consider that question as coolly, as dispassionately as you would consider a question of that kind between two of your neighbors." At the conclusion of the charge the defendant's counsel requested the court to charge "that there can be no recovery in this case unless they find that the defendant's servants negligently and wrongfully, in an attempt to throw the wire which they were removing over the plaintiff, struck the horse or wagon." To this request the court replied: "I refuse to charge upon that subject or other

than what I have charged upon that subject." To this the defendant excepted. The defendant also excepted to the charge so far as it instructed the jury that the plaintiff was entitled to recover if they should find that the injury was caused by a wrongful obstruction of the highway by the defendant.

The plaintiff was lawfully upon the highway when the accident occurred. He had a right to assume that it was in a safe condition and would not be obstructed or rendered dangerous by any act of the defendant. *Jennings v. Van Schaick*, 108 N. Y. 530 (13 N. Y. State Rep. 686.) The defendant's right to the use of the highway for the purpose of constructing, maintaining or removing its telegraph line was subject to the use of the traveling public. The defendant had no right to use the highway so as to obstruct it or render it dangerous to public travel. *Sheldon v. Western Union Tel. Co.*, 51 Hun, 591 (22 N. Y. State Rep. 837.)

The appellant claims that the case was submitted upon an erroneous theory, in that the cause of action alleged was for negligence while the case was submitted to the jury on the ground of an unlawful and wrongful obstruction of the highway. The evidence was sufficient to justify the submission to the jury of the question whether the defendant wrongfully obstructed the highway at the place where the accident occurred thereby causing the plaintiff's injury, and to uphold the verdict on that ground. Therefore the only question presented is whether under the pleadings it was error to charge that the plaintiff might recover upon that ground. No objections to the evidence were made on the ground of the insufficiency of the pleadings nor were the exceptions to the charge or refusals to charge placed on that ground.

The complaint was for the wrongful and unlawful act of the defendant as well as for its negligence. The allegations of the complaint were not of a mere omission by the defendant to perform some act or duty, but were that it committed a positive act which was wrongful and unlawful. The

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act was proved and alleged. The proof tended to show that it constituted a wrongful and unlawful use of the highway which amounted to an obstruction. It will be observed that the court in effect submitted to the jury the question whether the transaction which was the basis of this action was as alleged and proved by the plaintiff or whether it was as claimed by the defendant, and that the court instructed the jury that if it was as alleged and proved by the plaintiff he could recover, if not, that their verdict should be for the defendant. In the charge the court sometimes referred to the act of the defendant, as proved by the plaintiff, as an obstruction to the highway, and at others as negligence by the defendant.

The error claimed seems to relate more to the form of expression employed by the learned trial judge than to the substance or effect of the instructions given. We think the complaint was sufficient to sustain the recovery in this action, and that the defendant's contention that the case was submitted to the jury upon an erroneous theory cannot be sustained.

* * * * *

Judgment and order affirmed, with costs.

MERWIN J., concurs; HARDIN, P. J., not sitting.

NOTE.—See note to *Williams v. Elec. Lt. and Power Co.*, *post*.

C. F. SHELTON v. UNITED ELECTRIC RAILWAY COMPANY AND CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

Tennessee Supreme Court, December 6, 1890.

(89 Tenn. 423.)

WIRES IN STREETS.—CONCURRENT NEGLIGENCE.

A horse having been killed by contact with a telephone wire, it appeared that the telephone company had negligently permitted its broken wire

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to fall and remain upon the trolley wire of an electric railway company, which in turn had failed to provide its trolley wire with a guard wire and to observe the condition of the telephone wire, which was such as to arrest the attention of a prudent man engaged in the business of either company.

Held, that the trial court properly found that both companies were guilty of negligence and jointly liable.

APPEAL from Circuit Court of Davidson county. Action for damages. Appeal by defendants below. Facts stated in opinion.

Sleger, Washington & Jackson, for Railway Company.

Vertrees & Vertrees, for Telephone Company.

J. L. Nolen, for Shelton.

TURNER, Ch. J.: Shelton's horse was killed by coming in contact with a wire of the telegraph and telephone company, which had fallen across the trolley wire of the electric railway company. The wire of the telephone company had become much impaired. The falling of a wall of a burning building broke a pole of the telephone company, breaking the wires at several points. At the point of the accident the telephone wires crossed the railway track above the trolley. A broken wire fell across the trolley wire, and, while resting on it the horse came in contact with it and was instantly killed. There was no guard wire over the trolley wire. The case was tried by the circuit judge without the intervention of a jury. The condition of the telephone wire was such as to arrest the attention of a prudent man engaged in the business of either company. The circuit judge found, under the facts, that both companies were guilty of negligence and responsible for the loss, and gave judgment accordingly. The judgment is correct. While it was the primary duty of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also the duty of the electric company to see that its trolley wire

was in like manner protected from such contingency. While it was the duty of one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under such defective machinery. It might as well insist that it was not responsible for damages resulting from the fall of a rock which it had constantly recognized as threatening to fall, or of a dead tree which it had frequently noticed with decayed and giving roots, and knew would fall in the first wind or rain. The obligation to see that its road was in good repair, and its machinery in safe operating order, is not confined to the immediate and abstract presence of either, but extends to all surroundings that may depreciate the security of either. Both companies knew of the unprotected trolley wire, and the consequences of a contact of the wires of the one with those of the other. Both knew of the unsoundness likely to produce a fall of the one upon those of the other. Both were bound to guard against such likelihood, and, having failed to do so, are liable.

Affirmed.

NOTE.—See note to next case.

**JAMES WILLIAMS V. LOUISIANA ELECTRIC LIGHT & POWER
COMPANY.**

Supreme Court of Louisiana, March 23, 1891.

(48 La Ann. 295.)

OBSTRUCTION OF STREET BY ELECTRIC LIGHT WIRE.

(Head-note by the court):

The driver of a float with a heavy load above the ordinary height is not guilty of contributory negligence in veering from one side of a street to the other to avoid collision with a wagon in front, although in thus doing his float and load came in contact with an electric light wire suspended over parts of the street at a distance of fifteen feet from the ground.

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The pole which fell and broke plaintiff's thigh was not of the required diameter, and was deficient in quality. It was partly sap, when it should have been heart timber. The wire suspended from it was an obstruction. *Held*, that the defendant was not free from fault, and damages were properly allowed.

Streets should be ordinarily safe for travel and transportation over them. Case of this series cited in opinion: *Wilson v. Teleph. & Tel. Co.*, *ante*, 466.

APPEAL from Civil District Court, Parish of Orleans;
VOORHEES, Judge.

Farrar, Jonas & Kruttschnitt, for defendant and appellant.

Jos. N. Wolfson and R. R. Forman, for plaintiff and appellee.

BREAUX, J.: The pleadings disclose that plaintiff, a drayman, sued the defendant for damages to the amount of \$20,000.

He avers that the defendant company had, at the intersection of Magazine and Erato streets, an electric light crane and wire, which obstructed the use of those streets, as they were swung so low as to be dangerous to passengers; that on October 12, 1889, while he was engaged in hauling, although diligent, he came in contact with the electric light crane, and by reason of its defective and negligent construction of this wire and crane, and by reason of the rottenness of the pole supporting them, the crane fell upon him, broke his thigh, laming and crippling him for life, caused him great pain, and rendered him less able to earn his livelihood.

The defendant, in answer, pleads that its poles and wires and the lamp and crane under discussion are lawfully upon the streets of the city of New Orleans in a safe and proper place for lighting purposes; and that the plaintiff met with an accident by his own gross fault and negligence; that he was hauling, with a float, along Magazine street, a heavy iron tank, 15 feet high, and that the driver drove his float against the crane, and continued to drive his mules

until the tank pulled the crane and pole down upon the plaintiff; that the plaintiff should have taken good care, as he was on the highway, on a float with a heavy load, much above the ordinary heights of float loads; that, if this crane and wire were any obstruction to the streets, they were only such to this unusual load; that they were clearly visible; that the plaintiff was fully acquainted with the location; he had driven loads several times up the same street, and had taken ordinary precautions to avoid them, which he had failed to take at the time of the injury. * * * There was a verdict and judgment for the plaintiff for \$3,000. The defendant appeals.

* * * * *

The record discloses the facts of which the following is a statement: On the 12th day of October, 1889, the plaintiff and Henry Simmons, another colored drayman, were employed by John Connelly, a boss drayman.

They had 12 large iron tanks to haul, from the corner of Thalia and Magazine streets to an oil mill in Gretna.

The most direct route was that taken.

These tanks weighed 4,000 pounds each. They were loaded on floats; the load and float were in height 16 feet. Three of these tanks had been safely hauled over the street without accident.

One of them had been hauled the morning previous to the collision.

Between 1 and 2 o'clock P. M. they were hauling the fourth tank. Simmons was driving, and the plaintiff was sitting on the float, behind the tank, eating his dinner.

The testimony of the witnesses is conflicting as to the side of the street the float was on as it approached Erato street. The side of the street on which he was, has bearing, for the reason that the wire was higher from the ground on the left than on the right side. The defendant contends that it swung too low on the right hand side of Magazine street for him to pass; that he was aware of this and had always previously, because of these wires, crossed Erato street on

the left hand side. Three witnesses, including the driver of the float, testify that the float was on the right hand side going up; that he was hindered from continuing in the direction intended by timber wheels driven by one Foster, coming out Erato street across Magazine, in front of the float. He requested the driver of the timber wheels to stop, but the latter drove on.

That to avoid the collision he sheered off, but did not get over to the left side of the street in time; the tank caught the wire and pulled the pole down.

Other witnesses testify that he was on the left side of the street; that in veering to avoid the timber wheels he did not return to the left of the street, despite his attempt, in time to escape the accident.

The driver evidently pulled to the right to let pass the wagon in front, and then attempted to pull back to the left side of the street to avoid the wire; but this brought the top of the tank into contact with the electric wire, and by the weight against the wire caused the pole to fall.

This wire and others were suspended near the top of this pole and upon this pole upon the right hand side of the street it sagged within 15 feet of the ground. There was also a heavy crane resting on it used to suspend an electric light lamp.

The rotten pole, made weak by decay, broke off close to the ground, and fell upon the plaintiff, and broke his thigh. Immediately after the driver stopped his mules.

The pole in question was an 8 by 8 pine pole, which had been in the ground about four years.

The lamp had been located by the city surveyor.

The contract with the city required that the poles should be heart timber, not less than 9 inches square at the ground; and that the lamps should be suspended upon cranes, the latter not less than thirty-five feet from the ground.

The pole was of the required height.

* * * * *

It is in place to state, if Simmons, the driver of the float,

was negligent, the plaintiff does not question that he, being his fellow servant, can not recover. * * * We must now determine whether plaintiff or his fellow servant was guilty of contributory negligence.

The question is not free from difficulty.

On the left side of the street they had passed a number of times, at the place of the accident, and might again on that side have passed without accident.

The driver and the witnesses who testify on the subject state that he was attempting to return to that side. But was prevented, when near Erato street; suddenly the street was obstructed by timber wheels.

It became necessary for this driver to act promptly.

He had asked the timber wheel man to stop; he did not.

In that difficulty several alternatives presented themselves:

To drive on and collide with the timber wheels and mules and incur great risks.

To stop, or to veer to the right, and return to the left.

The first could not be thought of; as between the second and third, he selected the latter.

Even if there had been an error of judgment in the emergency of the moment it would not have been carelessness or neglect. In driving to the right there was no rashness, but a desire of avoiding a threatening collision in front.

The counsel for defendant urges that plaintiff had knowledge of defects or danger in the highway; that he was not driving an ordinary wagon carrying an ordinary load, but a very clumsy, unwieldy vehicle, pulled by five mules. Had the plaintiff freely chosen to drive under the low swung wire, and had negligently driven the tank against it, the principle invoked would apply. In the haste of the moment he did that which, possibly, any prudent driver would have done.

* * * * *

But the defendant company's pole and wire were an obstruction. Under its contract with the city, poles of

heart timber, not less than nine inches square, were to be put up. The pole in question was not of heart timber, and because of the sap it had badly decayed just above the ground. Its power of resisting was at least one-half less than it should have been.

While it is not necessary that all electric wires should swing as high as plaintiff's counsel contends they should ; they should be placed at an elevation more than fifteen feet from the ground when suspended across a highway.

Ordinary care and diligence should be exercised against decay and weakening of timber from age or the action of the elements.

"Municipal corporations must take notice of the tendency of timber to decay, and wherever the exercise of ordinary care involves the anticipation of defects that are natural and ordinary results of use and climate influences, and there is neglect on the part of the proper officer to make a sufficiently frequent examination of a particular structure, a city will not be relieved from liability, although the defect may not be open and notorious." Elliot, Roads and Streets, p. 462.

The foregoing, although relating to the diligence required of municipalities, is not entirely without application. With reference to the wires over a part of the "traveler's path" in the thoroughfare, we find the applying rule, viz.:

"When a road or street is opened, and public travel is invited thereon, it must be made reasonably safe for such travel." Ib. p. 455. See, also, *Wilson v. Telephone and Telegraph Co.*, 41 An. 1048.

It was proven that this load and float were not exceptional in height.

Cartmen haul at times loads equally as high, even higher.

* * * * *

The question of damages requires our careful attention. Plaintiff was confined to bed at the Charity hospital from the 12th of October to the 7th of December. On the last mentioned day, on the advice of his physician, he attempted to walk ; in the attempt he fell, and his leg was fractured

at the healing place. He remained in bed two months longer.

Plaintiff's wages were \$1.25 a day.

He is not entirely disabled.

He can perform a good many forms of work as well as before. He is on the decline of life, and without the injury his usefulness in doing work requiring strength would be on the wane.

But the unfortunate accident has, none the less, made a dent in this humble man's life we cannot entirely straighten or completely remedy.

We fix the damages at an amount we think will compensate actual loss, and, in part, the suffering endured.

The defendant was in fault, but the negligence was not gross. The carelessness was not great.

We cannot agree with the jury in so far as relates to amount of damages.

The amount must be reduced to \$1,000.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the judgment thereon be amended so as to reduce the amount to \$1,000, with interest as allowed, and that thus amended said judgment be affirmed at appellee's costs.

NOTE.—For other cases upon similar subjects see INDEX to this and previous volumes, title "Poles and wires in streets, duty to the traveling public."

See notes, vol. 1, p. 263; vol. 2, p. 391.

JAMES CORNELL V. THE DETROIT ELECTRIC RAILWAY COMPANY.*Michigan Supreme Court, Oct. 10, 1890.*

(53 Mich. 495.)

ELECTRIC RAILWAY.—FRIGHTENING A HORSE.—CONTRIBUTORY NEGLIGENCE.

When the owner of a young horse, which he knows to be unaccustomed to electric cars, and knowing the dangers of such a course, for the purpose of testing the horse, drives him where he knows electric cars will be met, he is guilty of contributory negligence which will prevent his recovery against the railway company for injuries sustained by his horse taking fright at the cars.

Facts held to not warrant finding of negligence on the part of the railway company.

ERROR to Wayne county. Action for negligence. Appeal by defendant below. Facts stated in opinion.

Russell & Campbell, for appellant.

James H. Pound, for plaintiff.

GRANT, J.: The defendant owns and operates an electric railway upon Dix avenue, in the city of Detroit, under authority granted by the city. At the time of the accident complained of, the street was not paved; the track was laid in the center, and was several inches higher than the roadway upon either side, thereby rendering it somewhat difficult for persons to drive from one side to the other, except at the street crossings. The situation of Dix avenue, and of the streets crossing it near where the accident occurred, is shown by the diagram on following page.

The land in the vicinity was open common, except three houses situated at the corner of Dix and Military avenues.

Plaintiff had his horse and buggy, and was driving on the right hand side of the street. His statement is substantially as follows: He had crossed Campbell avenue, and was within about seventy-five feet of Calvary avenue, when he saw the cars coming around the bend, about 350 feet distant. He stopped his horse, put up his hand as a signal to stop the train, jumped out of his buggy, and took his horse by the head. He judged that the cars were about half way down when he caught his horse by the head, and that they were slowing down. The horse began to exhibit signs of fear, and he led him across the sidewalk into the open field. The horse dragged plaintiff around the open field, and finally turned, and dragged him across the street onto the track, where plaintiff fell and was injured, and the horse ran away. When the horse began to run with the plaintiff, the cars, according to his own testimony were about 150 feet distant, and slowing down, and stopped before reaching the point in the street where plaintiff stopped his horse.

The testimony on the part of the defense was that the person in charge of the cars saw plaintiff when about 400 feet distant; that he saw signs that the horse was frightened; that he rung the gong when nearing the bend, which statement is not disputed; that he ran slowly for about 250 feet, when he brought the cars to a stop; that the horse did not cross the track, but that he came back over the sidewalk into the street, then turned around and ran across the sidewalk again into the open lot; that plaintiff stumbled on the sidewalk as the horse was going over it the second time; and that all usual and necessary precautions were taken by the defendant's servants.

The negligence alleged is that defendant did not observe sufficient caution in coming around the bend to alarm plaintiff, so as to enable him to avoid the trouble complained of; but that, without notice, and at a great rate of speed, it caused its cars to come suddenly around the bend as plaintiff was approaching. There is no evidence that any other notice than the

noise produced by the running of the cars and the ringing of the gong, would have been of any avail, nor that those were not sufficient. Plaintiff has not even suggested the necessity of any other notice. But any question of notice is eliminated from the case by the plaintiff's own testimony. He was familiar with the situation. He had driven there before, and had had trouble with other horses. He was on the outlook and saw the cars as soon as they reached the bend. Any additional noise for the purpose of giving notice would certainly have tended to increase his horses' fright, without being of any possible use.

The record fails to show negligence on the part of the defendant. The rate of speed is not shown to have been unusual or excessive. The horse evidently became restive and somewhat frightened when the cars first appeared in sight, 350 or 400 feet distant. Defendant's servants in charge of the cars were not under obligations to immediately stop them. They had fulfilled their duty by commencing to run more slowly. If such companies were obliged to stop their cars at that distance upon seeing a horse, with his owner holding him by the head, in apprehension of fright, or in actual fright, they could not meet the demands of the requirements of public travel. The defendant had an equal right to the use of the street with its cars as plaintiff with his horse. Each was bound to exercise due care and caution; and this the defendant did. It was evidently the sight of the moving cars, not their speed, that frightened the horse. They were from 150 to 200 feet distant when plaintiff and his horse went over the sidewalk into the common. It is difficult to see how the defendant's servants were under any legal obligation to act differently from what they did.

The plaintiff is not entitled to recover on his own statement. He took his horse, three years old, which was unused to the place or the cars, and for the purpose of trying him. He testified: "I never had the horse there before. I wanted to see how he acted." He knew the

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danger of his horse becoming frightened, and yet he took him into this dangerous place knowing that the cars were coming. There was ample opportunity for him to have turned into another street where there was less danger in subjecting his horse to the sight of the cars. It was also admitted upon the hearing that there were other streets by which he might have reached his destination. It is common knowledge that such vehicles, when first seen in motion, have a tendency to frighten animals. When one deliberately drives into such a place as this was, with full knowledge of the situation and danger, for the express purpose of testing his horse, he is guilty of contributory negligence, and, under the decisions of this court, is not entitled to recover. This disposal of the case renders it unnecessary to discuss the other assignments of error.

The judgment must be reversed, and a new trial ordered, with costs of both courts.

The other justices concurred.

NOTE.—See note to next case.

NORTH SIDE STREET RAILWAY COMPANY V. TIPPINS.

Texas Court of Appeals, Nov. 1, 1890.

(14 S. W. R. 1067.)

ELECTRIC STREET RAILWAY.—FRIGHTENING HORSES.

The mere fact of the sounding of a gong by the driver of a street car does not constitute negligence, so as to admit a recovery against the company of damages for injuries caused by the frightening of horses by the gong.

APPEAL by defendant below from judgment of Tarrant County Court.

Templeton & Carter and S. L. Samuels, for appellant.

WILLSON, J. : Appellee hitched his team of two horses attached to a wagon to a post on Main street, in the city of Ft. Worth. Appellant's electric street car, in passing along said street, frightened said horses, and they broke loose from the post to which appellee had hitched them, and ran away, breaking the wagon, etc. Appellee sued for damages in Justice's Court, and recovered judgment for \$83.00, which judgment, on appeal by appellant to the County Court, was reduced to \$70.50. To entitle appellee to recover damages, it devolved upon him to show by evidence that the injury of which he complained resulted from the negligence of appellant or its employees in operating the street car. We find no evidence of such negligence in this record. The driver of the street car was sounding a gong while the car was moving along the track. This noise was made to warn persons of the approach of the car, and to prevent accidents on the track. It was not a violation of law, or of any ordinance of the city, to sound the gong, nor does it appear that it was sounded unnecessarily or negligently. We conclude, therefore, that the sounding of the gong did not constitute negligence. Appellant had the legal right to operate its street cars upon said street, and could only be liable in damages for injury caused by the carelessness of those operating them. It was not shown that the driver of the car was aware that appellee's horses were frightened, and would probably break loose and cause injury to appellee's property unless he ceased to sound the gong. In other words, it was not made to appear by the evidence that, by the use of ordinary care and prudence, the driver of the car could have prevented the injury. It was the duty of the driver to watch the track upon which the car was being propelled, and to avoid collisions and accidents upon the track. He was not required, we think, to keep a lookout for teams not upon or approaching the track. He might well act upon the presumption that teams not upon or approaching the track, but which were

standing on the sides of the street, were seemingly hitched, or if not so hitched, were not liable to become frightened and run off. *Hargis v. Railway Co.*, 75 Tex. 23 (12 S. W. Rep. 953.) Because the evidence fails to show a good cause of action, the judgment is reversed and the cause is remanded.

NOTE.—This and the preceding case are the advance guard of an army of cases which have appeared since the general introduction of electric street cars, causing a new peril in the use of streets. The principles of law involved in such cases are, however, mainly the familiar ones of negligence and contributory negligence. Only the application of them is new.

ALMERON KRAATZ V. THE BRUSH ELECTRIC LIGHT COMPANY.

Michigan Supreme Court, Oct. 10, 1890.

(82 Mich. 457.)

CROSSING OF ELECTRIC LIGHT WIRES.—INJURY TO EMPLOYEE.—EVIDENCE.

The stringing of wires by an electric lighting company so that the wires of one circuit cross another, and so that a slight sagging of one wire will bring the two in contact, thus wearing off the insulation and leaving the wires bare, and maintaining one circuit as a live one while employees are set at work handling with bare hands the wires of the dead circuit so crossing the wires of the live one, is plain and unexcusable negligence. In an action by an employee claiming injury by a shock thus caused, held not improper to allow hypothetical questions, directed to the effect of certain conditions of the wires as to the transfer of electricity, although some of the conditions were not shown to exist in the particular case, they being shown to be caused by the same general principles that are supposed to govern electricity, and therefore analogous to the case in hand.

Evidence that a change was made in the method of stringing defendant's wires a month or so after the accident, and of their condition at that time, though immaterial, held not so prejudicial as to warrant the reversal of a judgment for the plaintiff based on that alone.

Held, no substantial error in admitting evidence of crossings of wires upon other circuits of defendant's plant, and the causes and effects of such crossings.

ERROR to Wayne county. Action for negligence. Appeal by defendant. Facts stated in opinion.

Marston, Cowles & Jerome, for appellant.

Thomas Hislop (Elliot G. Stevenson, of counsel), for plaintiff.

MORSE, J.: The plaintiff recovered judgment in the Wayne Circuit Court for damages, upon the claim that he was severely and permanently injured and crippled by an electric shock while trimming lamps on an electric tower in Detroit, on August 19, 1886, at about 9 o'clock in the morning.

The plaintiff's evidence showed that he had been working for the defendant company as a trimmer from April, 1886, up to the day of the injury. On that day he had trimmed the lamps in twelve or thirteen towers before he came to the tower at the corner of Hastings and Marion (now Winder) streets. He went up this tower and trimmed three lamps, and had nearly completed the fourth one, when he received a shock, from which he claims his condition at the time of the trial resulted. It is not disputed but that he received or had a shock to his system of some kind while on this tower. The defense claimed that it was from paralysis, and not from electricity, and much medical evidence was introduced on both sides, one set of physicians claiming that his injuries were or might have been caused by an electric shock, and another set testifying that his condition was the result of paralysis. This question was settled in plaintiff's favor by the verdict of the jury.

This tower where the shock was received was upon the circuit numbered eleven, and the wires should have been, and were supposed to be, at the time plaintiff was working upon the lamps, dead wires, or wires not charged with electricity. It is very plain from the whole evidence that, if the shock received by the plaintiff was from electricity, it was caused by live wires, or wires charged with an elec-

tric current, crossing the dead wires on circuit No. 11, and communicating by contact electricity to one or more of them. At this time circuit No. 4 was used for the purpose of furnishing electric light during the day time, and the wires upon such circuit were consequently "live wires" at the time plaintiff was trimming the tower where he was injured. The wires in circuit No. 4 ran part of the way upon the same poles as the wires on circuit No. 11, to wit, from the works of the defendant to the corner of Shelby street and the alley, "and from the corner of Griswold street and Michigan avenue, the northwest corner on the east side of Michigan avenue, around Farnsworth's store, from Woodward avenue to the corner of Gratiot." There were crosses of these dead and live wires observed on the very day of the injury to plaintiff. It was shown that when the insulation of these wires is worn off, and such insulation will wear off by friction as well as from other causes, so that the bare wires come together—a live and a dead wire in contact—the electricity will instantly be conveyed from the live to the dead wire along the whole line of the wire. It was also shown that the insulation had worn off in places on the wires; that the wires were improperly placed upon the poles so that the wires of one circuit crossed those of another, and that whenever they sagged, and sagging was to be expected, the wires of different circuits would touch one another.

The main objections to the verdict are directed against the declaration and proof in the case. The declaration was specially demurred to, and the demurrer overruled. The defendant then pleaded, and issue was joined upon the plea. The questions raised upon demurrer were again interposed upon the trial by the defendant objecting to the introduction of any evidence under the plaintiff's declaration. * * * * *

It is strenuously argued that there was no evidence in the case showing how the accident occurred. As before intimated, we think differently. The first question to be determined by the jury was the nature of the shock that the plaintiff received. Was it from electricity or paralysis?

If from the former, as the jury found, it was not difficult to ascertain how it occurred. The wires upon circuit No. 4 were live wires. They were in contact in more than one place that day, as shown by the proofs. The shock, it is true, might have been caused by turning the electric current upon circuit No. 11, through the negligence of the defendant's employees, or the act of a stranger, or perhaps from unavoidable accident, though the latter two suppositions are hardly entertainable; but the most probable cause was the transfer of electricity from some live wire on circuit No. 4 to some dead wire on circuit No. 11 at some of the crosses of these wires. The jury under the evidence had the right to infer that this was the cause, and they were not compelled to find what particular wire of circuit No. 4 came in contact with a wire of circuit No. 11, or with what particular wire of No. 11, nor at what precise spot this contact and transfer took place. This would be an impossibility, and such a chasing or tracing of lightning is not required. The negligence of the defendant company in so stringing its wires that the wires of one circuit cross another, so that a slight sagging of one wire will bring the two in contact, and maintaining one circuit as a live one while employees are set at work handling with bare hands the wires of the dead circuit so crossing the wires of the live circuit, is plainly apparent to any one. And there was no excuse for it, when we consider the deadly nature and effect of the electric current passing over the wires.

Fault is found with the charge of the court upon the assumption that the circuit judge put hypothetical suppositions to the jury, not based upon any testimony in the case, thereby misleading them, and permitting, and perhaps inducing, them to base a verdict upon one or more of such suppositions. We do not think the charge is open to this objection. The evidence in the case took a wide range, and there was a great deal of theory advanced upon both sides in the testimony, as there necessarily will be in the study and contemplation of an agency as little understood by the great mass of people as is electricity, and of which it may

well be said that the savants know but little. The court said, speaking of the defendant and its employees :

“Was it through defendant’s negligence that the plaintiff was injured? Did they fail to turn off any of the live wires which connected with the tower located in the circuit on which this plaintiff was working (being designated as circuit No. 11), for the dead wires, so-called, convey no electricity, and therefore could not possibly injure the plaintiff. It is only from the contact of the dead wire with a live wire, and remaining together for some time, or by the opening of some of the machinery at the principal place of business, that is, where the electricity was manufactured on Third street, just below Fort street, that he could have been injured. Does this evidence show you such was the case? Does this evidence show you that the wires were improperly placed upon the poles and upon some of the arms in such a manner that a live wire and a dead wire should come in contact with each other, and by such reason of coming in contact, and the crossing of the dead and the live wire, that an electric current was communicated to a line which carried it to the tower where the plaintiff was hurt? If you should so find that the plaintiff, when in the performance of his duty, had the right to do the work he was doing, and was in the exercise of due care to avoid injury, and if you should find that, by means of electricity conveyed to the tower, in the manner stated, he received a shock that injured him, such as described, then the defendant would be liable to compensate the plaintiff for the injury he sustained; provided you find that the injury was done through the negligence of the defendant, and unless you can find it was done through the negligence of the defendant, plaintiff cannot recover.”

It is objected that there was no testimony tending to support the idea that the company failed to turn off the electricity from any of the wires in circuit No. 11. While this may be so, there was evidence to show that one of the wires in circuit No. 11 was charged with electricity, and shocked the plaintiff. The court told the jury, and we

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think properly, under all the testimony, that this wire being charged with electricity could only happen in one of two ways: By the contact of the live wire of another circuit, or by the turning of electricity upon circuit No. 11. We do not think the jury were misled or the defendant prejudiced by this part of the charge. While there was no positive or direct evidence that any employee of the company turned or allowed the electric current to pass into any of the wires of circuit No. 11, yet the fact appeared, as found by the jury, that such current did enter one of such wires, and injured the plaintiff. It was proper for the jury to inquire into and determine how it got there, and no error was committed in allowing them to determine whether or not there was any testimony showing that the current came directly from the works of the company. And, in view of the testimony that circuit No. 4 was a live circuit that morning, and that its wires came in contact with the wires of No. 11, it is not at all probable that the jury found otherwise than that this contact caused the injury. The charge was eminently a fair one, and properly stated the law of the case.

The hypothetical questions permitted by the court were entirely proper. They were all directed to the effect of certain conditions of the wires as to the transfer of electricity, and although some of the conditions inquired into were not shown to exist in this particular case, yet they were all shown to be caused by the same general principles that are supposed to govern electricity, and were therefore analogous to the case in hand. Take for instance this question:

“Supposing that a live wire should come in contact, for instance, with a telephone wire, by the telephone wire settling down upon the electric light wire, what effect would that have upon the telephone wire?”

This question was entirely proper and competent. The telephone wire was used as an illustration, and although there was no claim or evidence of a telephone wire having anything to do with the plaintiff's injury, yet the

effect upon a telephone wire would be the same as upon an electric light wire, and therefore the illustration used could not only do no harm, but was directly in line with and corresponding to the question at issue.

There was no substantial error in showing crosses of the wires at other places in the company's plant not connected with circuit No. 11, and the effect and causes of such crosses. This evidence was given to show that the crosses were caused by the same method of stringing the wires as on circuit No. 11; that such crosses, by the sagging of the wires, brought the wires in contact, which contact wore off the insulation and left the wires bare. When these facts were noted by an eye witness, it certainly was competent for him to testify to it to show that the same causes on circuit No. 11 would cause the same effect as he noticed elsewhere, the conditions being exactly the same in both cases.

A witness, Dyer, was permitted to testify that in the fall of 1886, some months after the injury to plaintiff, he was employed by the superintendent and foreman of the defendant to change the wires on the poles, and put them in uniform shape, so that the wires would run straight and not cross each other, which he did, and that before that time, from the time he went to work for the company, in the spring of 1886, the wires were in bad shape.

"One wire would run from the top arm, and probably before the time it got four blocks or three blocks it would probably be on the lower arm, on the opposite side of the pole from where it started.

"Q. It would make a complete cross from side to side, and also from the top cross-arm to the bottom?

"A. Yes. There is some to-day the same way."

It was alleged that it was error to permit this witness to state that a change was made in the manner of stringing these wires after the injury to plaintiff, and we are referred by counsel for defendant to *Woodbury v. Owosso*, 64 Mich.

239, 243, and to *Grand Rapids, etc. R. R. Co. v. Huntley*, 38 id. 540, as sustaining this allegation.

It was certainly immaterial what change was made in the stringing of these wires after the injury was accomplished, or what their condition was a month or so after the accident. What it was immediately before and at the time of the accident, and soon thereafter, before any change was made, was material. We can see no harm, however, in showing that the wires were strung as they were on the day of the injury, on April 1, 1886, and continued until some months later than the accident, in view of the fact that this method of stringing the wires was claimed to be the cause of the accident. If it was a defect, it was not incompetent to show how long it had existed before the injury, and what was the natural result of its existence. *Smith v. Sherwood Tp.*, 62 Mich. 159 (28 N. W. Rep. 806). While the nature of the change made was immaterial, as well as when it was made, we do not think that the admission of this evidence was so prejudicial in this case as to warrant a reversal of the judgment for that cause alone.

It is very plain to us that if the plaintiff received an electric shock it was caused entirely by the defective stringing of the wires, so that they crossed each other, and by sagging come often into contact, so often that men were constantly kept employed along the line taking up the sagging or slack of the wires and endeavoring to remedy the natural result of such crossing of different circuits. It is not so plain to us that the injuries of plaintiff resulted entirely from electricity, but this matter has been twice settled by a jury in his favor, and it is not our province to disturb the verdict because of any doubt we may have on a question of fact.

The judgment is affirmed with costs.

The other justices concurred.

NOTE.—See INDEX to vol. 2, title "Injuries from electrical apparatus."

**THE SCRANTON ELECTRIC LIGHT AND HEAT COMPANY V. THE
SCRANTON ILLUMINATING, HEAT AND POWER COMPANY.**

Pennsylvania Supreme Court, October 1, 1888.

(122 Pa. St. 154.)

ELECTRIC LIGHT COMPANY.—EXCLUSIVE PRIVILEGE.

A corporation which has so misused its charter privileges as to hinder rather than advance the public interests, by combining with another corporation so as to repress the use of the useful commodity which it was formed to supply, is not entitled to the aid of a court of equity to suppress a competition arising from its neglect of duty and fraud.

A grant by a Legislature of exclusive privileges to a corporation should be construed strictly against the corporation, and nothing should be given it by intendment.

A statute relative to "companies for the manufacture of gas, or the supply of light or heat to the public by any other means," held not to embrace electric lighting.

APPEAL from Court of Common Pleas of Lackawanna county.

Bill in equity for injunction, restraining defendant from furnishing electric light to the city of Scranton, and from interfering with plaintiff's rights.

Appeal from final decree confirming report of a master and dismissing the bill. The facts sufficiently appear in the opinion.

W. H. Jessup, for appellant.

Robert Snodgrass (with him *Edward N. Willard* and *Everett Warren*), for appellee.

GORDON, C. J.: The Scranton Electric Light and Heat Company which, in the case at hand, seeks to restrain the defendant from furnishing electric light to the citizens of

Scranton, was chartered on May 20, 1884, under the act of April 29, 1874, "for the purpose of furnishing light and heat to the city of Scranton and suburbs, and the inhabitants thereof." Soon after the organization of this company the stock thereof was purchased by the president of the Gas and Water Company, in order, as the counsel for the appellant alleges, that "the two companies might work in harmony, and furnish all the facilities demanded by the public for light without the ruinous competition which might prove disastrous to both." In other words, the gas company effectually anticipated and prevented a competition that might have proved highly beneficial to the community by securing the stock of its rival.

Of course, if this were done for a legitimate purpose, and that purpose had been carefully carried out, no serious objection could be taken to it. But unfortunately for the plaintiff's case the master has found that neither in design nor execution was that purpose originated or carried out for the welfare of any one but the company. He finds, "that from the first of July, 1884, until the commencement of this suit, the business of the company was managed wholly in the interest of the Scranton Gas and Water Company, not with a desire and effort on part of its management to encourage the use of electric light, and to furnish the best and cheapest light practicable, but with the intention, as far as practicable, to restrict the use of electric light for the benefit of the said gas and water company, and depending upon the supposed exclusiveness of the plaintiff's franchise for protection against competition." This finding is sustained not only by the oral testimony but by the results. When W. W. Scranton, the president of the gas and water company, took charge of the electric company, it had already secured subscriptions for sixty-four arc lights, but within a year thereafter the number of those lights was reduced to fourteen, and up to the time of the establishment of the new company, that number was never increased so much as to exceed twenty. This result seems to have been occasioned by a change in

the method of furnishing the electricity which produced an increase of cost, and also by a reduction in the price of gas. The latter result being beneficial to consumers, not only could not be complained of, but *prima facie* might be regarded as the cause of the falling off of the demand for electric lights. This explanation appears, however, from subsequent events, to be fallacious; for, since the establishment of the competing company, the plaintiff has secured contracts for 230 arc lights, and the defendant has placed 100 lights of the same character, together with 4,000 incandescent lights. It is thus obvious, that by the operations of the plaintiff, the citizens of Scranton were purposely deprived of a valuable source of illumination without any corresponding benefit.

Now, the primary object of the institution of a corporation is the public welfare, and the interest of the stockholders is but secondary; hence the wilful frustration of that intention by the act of a company is a fraud on the public, and the corporation perpetrating it is entitled to no equitable consideration. According to the finding of the master, of this kind of fraud the complainant has been clearly guilty; it has become the mere instrument in the hands of the gas and water company to deprive by a false pretence the city and citizens of Scranton of a very useful, if not absolutely necessary commodity. How then can it stand in a court of equity? It is to no purpose to say that its charter cannot be attacked in this collateral proceeding. No one is attacking its charter, but it cannot interpose that charter as a cover for its own fraud. It has appealed to the equitable side of the court to suppress, for its own benefit, a competition that has arisen from its neglect of a charter duty, and without touching upon its legal rights or legal remedies, this, we think, cannot be done. Chancery deals only with conscionable demands; and with those that are unconscionable, whether through fraud or mere neglect, it will have nothing to do. Therefore, without further comment, we might affirm the decree of the Common Pleas,

but as there is another important question involved in the case, we cannot properly pass it without comment.

Under the third clause of the 34th section of the act of 1874, the plaintiff claims the exclusive right to furnish the city of Scranton and its inhabitants with electric lights. This claim may be regarded as sound, if in fact the said section does include electric lighting, but not otherwise. Did the Legislature intend to embrace electric lighting in the language "companies incorporated under the provisions of this statute, for the supply of water to the public, or for the manufacture of gas, or the supply of light or heat to the public *by any other means*." Before answering this question we must call attention to what has heretofore been regarded as an unalterable rule; that is, that a legislative grant to a corporation of exclusive privileges is, as said by Mr. Justice GREEN, in *Emerson v. The Commonwealth*, 108 Pa. 111, to be construed most strictly, and we may add, that every intendment not obviously in favor of the grant must be construed against it. Monopolies are favorites neither with courts nor people. They operate in restraint of competition, and are hence, as a rule, detrimental to the public welfare; nor are they at all allowable except where the resultant advantage is in favor of the public, as, for instance, where a water or gas company could not exist except as a monopoly. Applying then the rule here stated to the case in hand, and we cannot pronounce the conclusion of the master and court below to be erroneous.

In the case above cited the sharpest technicality of construction was adopted in order to defeat the extravagant demand of the corporation claiming the exclusive privilege to furnish the city of Pittsburgh with natural gas for the purposes of fuel. But in the case before us it is apparent that the Legislature did not, in the making of the act of 1874, intend to embrace lighting by electricity. It is true, that the language of this statute seems, at first sight, to be broad enough to embrace all methods of lighting and heating then known, or that might thereafter become known, yet, we

suppose, it will not be contended that the intention was to grant to this company the exclusive privilege of furnishing to the citizens of Scranton coal, wood, oil and other well known and ordinary materials for lighting and heating. Not, indeed, that the law makers could not have conferred such power, but because it is not probable that they intended to confer a power so unreasonable. It is, therefore, obvious that we must consult not only the letter of the act, but also the intention of its makers. If, however, it were designed to embrace a method of lighting by electricity, a method not then in use for economic purposes, it is remarkable that the means necessary for its proper distribution were not provided for. Under the 34th section of the act, the only one upon which the plaintiff relies for its exclusive right, there is no power conferred to enter upon the public streets for the erection of poles and placing of wires, the privilege of so entering being confined to the laying of pipes only. From this it is clear that the Legislature had in mind, not a then unknown process of public lighting and heating, but a process involving the use of gas, or some similar material, for the distribution of which pipes only were necessary. Having thus ascertained the intention of the law-making power at the time of the passage of the act of 1874, we cannot agree to extend the franchise of the plaintiff by construction, but are willing rather to concur in the decree of the court below, because the right so claimed, not only may be, but has proved to be, detrimental to the public welfare.

The decree of the court below is now affirmed at costs of appellant.

BEGGS v. EDISON ELECTRIC ILLUMINATING COMPANY.*Alabama Supreme Court, Nov., 1891.*

(96 Ala. 295.)

ELECTRIC LIGHT COMPANIES.**An electric light company is a manufacturing corporation.****APPEAL from City Court of Birmingham.***Lane & White, for appellant.**James H. Little, contra.*

STONE, C. J. : * * * The other question sought to be raised by the demurrer was, whether the Edison Electric Illuminating Company and the Merchants' Electric Light & Power Company were such corporations as were authorized to be consolidated under the statute. Section 1565 of the Code of 1886, declares that

Any two or more mining, or quarrying, or manufacturing corporations may unite or consolidate their capital stock, property and business in the manner hereinafter provided.

The direct question involved is, whether electric light companies are manufacturing corporations, and as such are authorized by the statute to consolidate. In view of the rapid development of electricity as a motive power, and considering the many places in which questions pertaining to this power arise, we do not deem it amiss to decide the question now presented.

The word *manufacture* means the making of anything by hand or artifice. *L. & N. R. Co. v. Fulgham*, 91 Ala.

555. Mr. Worcester's Dictionary defines *manufacture* as "the process of making anything by art, or of reducing materials into a form fit for use by the hand or by machinery." The definition that the word is given by the Century Dictionary is as follows: "The production of articles for use from raw or prepared materials, by giving these materials new forms, qualities, properties or combinations, whether by hand labor or by machinery." According to the above definitions of the word *manufacture*, we are constrained to consider and declare an electric light company a manufacturing corporation to all intents and purposes. It is no answer to this argument to say, that electricity exists in a state in nature, and that a corporation engaged in the electric light business collects or gathers such electricity. This does not fully or exactly express the process by which such corporations are able to make, sell and deliver something useful and valuable. The electricity that exists in nature is of a very different quality from that produced by means of machinery. The business in which an electric light company is engaged makes it necessary to invest large capital in the plant. Then there is purchased and consumed coal and other materials to produce steam in order to furnish the power for the operation of the machinery. Then there is supplied and operated a complicated system of machinery, like that commonly used in manufacturing establishments, such as boilers, engines, dynamos, shaftings, beltings, &c., and then by means of wires, cables and lamps, the mysterious power generated by the machinery used from the materials furnished is transmitted, and lights the streets and private houses. But the electric currents that produce these results can not be said to be "the free gift of nature, gathered from the air or the clouds." It is the produce of capital and labor, and in this respect can not be distinguished from ordinary manufacturing operations. The collection, storage, preparation for market, and the transportation of ice as found in nature, is not manufacturing; but the production of ice by artificial means is. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181.

As well say that a gas company, organized under the corporation laws, is not a manufacturing corporation, because both gas and the electricity generated are the result of artifice. Their purpose is the same, and their transmission is in a similar manner—the one by pipes, and the other by wires. It has been expressly decided that a gas company is a manufacturing corporation. *Nassau G. L. Co. v. Brooklyn*, 89 N. Y. 409.

When it is attempted to establish the proposition, that the gas which lights one room is a manufactured product, and the electricity which lights another is not, one is obliged to rely more on the definition of terms, and the distinctions of scientists, than the actual, practical processes and productions by means of which results in all respects, or at least substantially, the same, are produced. When we take into consideration that the electricity now used and supplied in the ordinary business of life is essentially the product of skill and labor, we can find no difficulty in reaching the conclusion that a corporation engaged in generating, storing, transmitting and selling such electricity is a manufacturing corporation. In reaching this conclusion we are not without precedent. The very point we have in hand was ably considered in the case of the *People, ex rel. Brush Electric Man. Co. v. Wemple*, 129 N. Y. 543. In that case the Court of Appeals of New York were unanimous in the opinion that the electric light company was a manufacturing corporation.

The City Court judge did not err in overruling the second and third grounds of demurrer.

Reversed and remanded.

THE THOMSON-HOUSTON ELECTRIC LIGHT COMPANY V. THE
CITY OF NEWTON ET AL.

U. S. Circuit Court, S. D. Iowa, C. D., June 24, 1890.

(42 Fed. R. 723.)

ELECTRIC LIGHT LICENSE.—POWER OF CITY TO MAINTAIN ELECTRIC LIGHT-
ING PLANT.

Although a municipal corporation has granted a license (not exclusive) to an electric lighting company to erect its appliances in the streets of the city, and the company has contracted to light the streets and public places; and in reliance upon such license and contract, the company has expended large sums of money in the erection of its plant; still the municipality is not estopped from itself erecting a plant and going into the business of furnishing electric light, as by statute it is permitted to do. And although by reason of its power to impose the expense of erecting and maintaining its plant and operating said business, upon the taxpayers, including the electric lighting company, the city can practically drive the company out of the field; still the court cannot interfere by injunction to restrain the city from erecting its contemplated plant. Certain questions of procedure in conducting a meeting of electors to vote upon the question of authorizing the city to go into the electric lighting business, as by statute required, considered and determined.

IN EQUITY. On motion for injunction.

H. S. Winslow and Clark Varnum, for complainant.

E. J. Salmon and J. G. Day, for defendant.

SHIRAS, J.: From the allegations of the bill filed in this cause, it appears that the complainant is a corporation created under the laws of the State of Connecticut, and is engaged in the business of erecting and operating electric light plants, and furnishing electric power; that by a contract entered into with the city of Newton, Iowa, it obtained the right to erect and maintain an electric light

plant in said city, and did so erect and maintain the same, and furnished lights to private citizens, and also, by contract with the city authorities, furnished lights for the streets and public places of said city, the latter contract terminating January 23, 1890; that, relying upon its agreement with the city, the complainant has expended at least \$20,000 in the erection of said electric light plant, and is prepared and is able to furnish all the electric light, both arc and incandescent, needed for lighting the streets and public places of the city, and to supply the wants of the people of said city, which has a population of about 3,000, and is what it is termed in the statutes of Iowa a city of the second class; that said city is now proposing to erect and maintain an electric light plant with which to light not only the streets and public places of the city, but also to furnish to the inhabitants light for private use; that it is the purpose of the city authorities to issue municipal bonds to the amount of \$14,000 for the erection of such electric light plant, and to tax the property in said city, including that owned by complainant, for the purpose of paying the interest and principal of said bonds; and that the right to erect such electric plant and issue such bonds is claimed under a vote had at the annual city election held March 30, 1890. An injunction is sought against the erection of such electric plant, and against the issuance of the bonds for such purpose; the bill thus presenting two general grounds, upon which is based the relief sought.

By chapter 11, acts 22nd Gen. Assem. Iowa, it was enacted that cities should have power to establish and maintain electric light plants, or to authorize the erection or the same, "but no such works shall be erected or authorized until a majority of the voters of the city or town, at a general or special election, by vote, approve the same;" and by section 3 of the act it was provided that the city should have power to issue bonds for the purpose of establishing electric plants, subject to the restriction that the total amount of indebtedness for all purposes should not exceed 5 per cent. of the assessed value of the taxable

property within the city. The theory of the complainant is that under this statute the city had the option given it in regard to electric plants, and that it could originally have erected the same by vote of the people, but, having elected to authorize private parties so to do, it is estopped from afterwards entering the field as a competitor; that while the complainant has not an exclusive right under its agreement with the city, and cannot object to the city authorizing other private companies or persons to erect and maintain electric plants in the city, yet complainant has the right to enjoin the city from undertaking the work, because the city can, through the exercise of its taxing power over the property in the city, including that owned by complainant, raise money for the running of the plant, instead of being compelled to provide the same by charging for the use of the light, and thus the city can practically drive complainant out of the field and destroy the value of its plant, which was erected in the city by an agreement with the municipal authorities. There is great force in the suggestion thus made. It is doubtless true that, if the city enters the field by the erection of its own plant, it will have an advantage over the complainant; yet it does not follow that the court can interpose and restrain the city from erecting the contemplated plant. As already stated, the city did not grant any exclusive rights to complainant; and the latter, when it erected its plant, took the chances as to future competition. All that is now shown is that the city proposes to erect an electric plant, and to raise the money for so doing by the issuance of bonds in the sum of \$14,000. The statute confers the right so to do upon the city; and I can see no ground justifying the court in interposing by injunction, and preventing the city from establishing its proposed plant. The suggestion that the city may use its taxing power so as to prevent complainant from fair competition on its part, is a suggestion only, and not the averment of a fact. The city may establish such rates for the lights furnished by it as to enable the complainant to fairly compete therewith. If it cannot

do so, and the city can supply its citizens at a lower rate, are not the latter entitled to the benefit thereof? It is entirely possible that the proposed action of the city may cause loss to the complainant. But there is no ground justifying action by the court short of holding that, by the mere action of the city in authorizing the complainant to establish its plant without any grant of exclusive rights, the city thereby deprived itself of the right to erect an electric plant for the benefit of its citizens; and this extreme ground I am not prepared to take.

It is also urged that the city has only the authority to erect an electric plant for the purpose of lighting the streets and public places of the city, and is not authorized to furnish lights for use in the houses and stores of its citizens. The act of the General Assembly giving the right to cities to erect, or to authorize the erection of electric plants, makes no distinction between lights used for public or private purposes; and the right of the city in the erection of its own plant is not limited in any other way than is the right of a company authorized by the city to erect the plant. It has been the uniform rule that a city, in erecting gas works or water works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric light plants in the same category.

The next ground relied on in support of the right to an injunction is that the question of establishing the electric light plant was not properly submitted to the electors of the city, and that the necessary authority did not exist in the city authorities to undertake its erection. The statute requires the question of erecting an electric plant to be submitted to the voters. It appears that February 10, 1890, the city council passed a resolution to the effect that, in accordance with section 4, chap. 11, of the laws of the 22nd General Assembly of the State of Iowa, there be submitted to the qualified electors of said city at the next general election, on the first Monday in March, 1890, the

proposition to issue the bonds of the city of Newton, Iowa, to the amount of not to exceed \$14,000, or so much thereof as in the judgment of the said city council may be needed, to be used for the construction of an electric light plant to supply light for the city of Newton and its inhabitants.

Certain petitions, signed by 25 or more resident tax payers in each ward of the city, were presented to the mayor thereof, requesting him to submit at the next general election the question whether an electric light plant shall be established in said city by the municipality, in pursuance of chapter 11 of the acts of the 22nd General Assembly, to be owned and operated by said city, and that, if it be determined by a majority of the votes cast that such plant be established, the bonds of the city be issued to the amount of \$15,000, or so much thereof as in the judgment of the city council should be needed for such work. Thereupon the mayor issued his proclamation addressed to the electors of the city of Newton, and reciting the resolution adopted by the council, and the presentation of the petitions aforesaid, and notifying said electors that at the coming general election the question as set out in the resolution of the city council would be submitted to them, and continuing:

Those favoring such proposition—that is to say, that an electric light plant be established by said city to supply light for said municipality and the inhabitants thereof, and to provide for the payment of the same by their issuing bonds of said city in an amount of not to exceed fourteen thousand dollars, or so much thereof as in the judgment of the said city council may be needed for such purpose, which said bonds shall bear interest at the rate of not exceeding six per cent. per annum, interest to be payable annually, and which bonds shall be redeemable in ten years, and payable in twenty years, shall have ballots either written or printed, and shall be in the following form, “for electric light plant,” and those opposed to said proposition shall have ballots either written or printed, and in the following form, “Against electric light plant.”

The form of the ballots is in exact accordance with the requirements of section 4 of the act of the twenty-second General Assembly. The objection urged to the resolution of the council, the petitions of the taxpayers, and the pro-

clamation of the mayor is that the proposition submitted to the voters embraced two matters: 1. Should the city erect an electric light plant? 2. Should the city issue bonds in the sum of \$14,000 or less to pay therefor, running twenty years? And that these two matters should either have been submitted at two different elections, or in two separate propositions at the same election, that so each elector could have voted as he pleased on each proposition. By reference to the act of the twenty-second General Assembly, it will be seen that it provides that cities may erect, or authorize the erection of, electric light plants, provided the electors so determine, and that the cities may issue bonds for that purpose; and then, when providing for the election, it prescribes the form of the ballot to be used. When the electors of a city are called upon to vote upon the question of the erection of an electric plant, it is of the highest importance for them to know what provision is to be made for payment of the expense of such erection; and it seems to me that the true wishes of the voters can be better ascertained by submitting to them the terms upon which the council expect to be able to erect the plant, than by submitting the single question of erecting or not erecting. Voters are not prepared to vote understandingly upon such a question unless they know how it is proposed to raise the funds needed in the erection of the plant.

The proclamation of the mayor submitted to the voters the exact proposition that they were called upon to decide, and in a way which could not mislead any one who would take the trouble to read the proclamation; and, while it may be true that some voters might wish to vote for the erection of an electric plant, but against the issuance of bonds for that purpose, and that they did not have the chance to express their wishes in this particular, yet such fact cannot invalidate the election that was held. The question the city council wished to have decided was not as to the abstract views of the taxpayers upon the question of the erection of electric plants, without regard to the manner of paying the cost thereof, but upon the one form

of the proposition — whether the voters favored the erection of such plant by the city when to do so the city would be required to issue bonds to an amount of not exceeding \$14,000. I cannot see that substantial objection can be taken to the form of proposition submitted; and, the majority of the voters having cast their ballots in favor of the erection of the electric plant, it must be held that thereby the city was authorized to undertake the erection of the plant, and to issue bonds for that purpose.

It is further urged that the city cannot properly undertake the erection of the plant except by the adoption of an ordinance providing therefor; a resolution to that effect being insufficient. The statute of Iowa creating municipal corporations does not make clear when the municipal action should be by ordinance, as distinguished from a resolution. If the passage of an ordinance is needed to authorize the city to enter upon the work of erecting and maintaining an electric plant, such course is still open to the city. I do not think the adoption of an ordinance was necessary to authorize the submission of the question to a vote of the electors. The statute provides that the council may order the submission of the question to a vote, or that the mayor may order the submission upon petition of the requisite number of taxpayers; and this precludes the idea of the necessity of adopting an ordinance as an essential prerequisite to submitting the matter to the electors. It is the action of the voters under the provisions of the statute that authorizes the city authorities to undertake the erection of the plant; and, even though there may be force in the suggestion that an ordinance specifically providing for the erection thereof ought to be passed, I do not see that the fact that such ordinance has not yet been adopted calls for action on the part of the court by way of injunction.

It is also averred in the bill that the issuance of \$14,000 in bonds will increase the indebtedness of the city over the constitutional limit of 5 per cent. upon the taxable value of the property within the limits of the city. According to

the showing made in the affidavits submitted by complainant, the indebtedness at the time the vote was taken was such that the issuance of \$14,000 in bonds would carry the amount due somewhat over the 5 per cent. limitation; but, as appears from the affidavits submitted on behalf of the city, before the city in fact issued its bonds the indebtedness had been reduced by payments thereon so that the addition of the \$14,000 to the amount existing at the date of the bonds did not reach the constitutional limit. The vote of the electors did not create an existing indebtedness. It authorized the city to undertake the erection of an electric plant. The city authorities, in carrying on this work, are subject to the constitutional limitation; but no debt was created until the bonds were issued and sold, and at that time the indebtedness was not increased over the limitation by the sale of bonds.

It further appears that on the 28th of April, 1890, the city council passed an ordinance reciting the result of the election on the question of the erection of an electric plant, and providing that the mayor and city clerk are authorized and directed to issue bonds of the city in the sum of \$14,000, twenty thereof to be of the denomination of \$500 each, and twenty of \$200 each, to be used as needed in the erection of the electric plant. Thereupon a contract for the sale thereof was made with the Citizens' National Bank of Des Moines, whereby the bank agreed to take from the city its bonds to the amount of \$14,000, paying par therefor, but the bank preferred to take bonds at \$1,000 each rather than in smaller amounts; and thereupon the city council amended the ordinance of April 28th by passing on the 23rd of May, 1890, a substitute for the first section, wherein it was provided that fourteen bonds of the \$1,000 each should be issued. The amended ordinance took effect June 2nd. On the 31st of May the city authorities delivered to the bank fourteen bonds for \$1,000 each, and received the pay therefor in accordance with the previous agreement entered into with the bank, the bonds thus delivered bearing date June 2nd. It is now urged that the bonds were in fact issued

and delivered before the ordinance authorizing the issuance thereof took effect; and therefore the bank, which has been made a party defendant, should be enjoined from selling the bonds, and that they should be declared void. The fact does not present a case of an issuance of bonds tainted with fraud or illegality in the purpose of their issue, wherein it might be necessary, for the protection of the city or its taxpayers, that an injunction should issue to prevent the bonds passing into innocent hands. If these bonds should be delivered back, the obligation would be upon the city to execute and deliver to the bank its bonds in the sum of \$14,000, and, while it may have been an irregularity to deliver the bonds to the bank before the amended ordinance took effect, yet it was in fact done, and the city has received the full value therefor, and certainly the complainant, as a taxpayer in the city of Newton, has no ground to invoke the action of a court of equity for its protection in the premises. If the delivery of the bonds before the taking effect of the amended ordinance destroys their validity, which I do not mean to affirm, that is a legal defense thereto. If there exist ground for equitable interference, it would rather be in favor of the bank than of the taxpayer.

Counsel have presented other points in argument, but none which call for particular remark. I find no substantial ground calling for the issuance of the writs of injunction prayed for; and the motion therefor is overruled, and the restraining orders heretofore granted are set aside.

NOTE.—In *Mauldin v. City Council of Greenville*, North Carolina Supreme Court, Apr. 21, 1890, 11 So. E. Rep. 484, held, that the power to light streets was within the police powers granted to a city by its charter, and that it might purchase and operate an electric light plant for that purpose, but not for private lighting, which would be *ultra vires*.

**THE BRUSH ELECTRIC LIGHT CO. v. JONES BROTHERS
ELECTRIC CO. ; and THE BRUSH ELECTRIC LIGHT CO. v.
THE QUEEN CITY ELECTRIC CO.**

Hamilton County (O.) Common Pleas, April 17, 1890.

(28 Weekly Law Bulletin, 829.)

RIGHT OF CERTAIN CORPORATIONS TO FURNISH ELECTRIC LIGHT.

Corporations formed, one "for the purpose of manufacturing, buying and selling and dealing in telegraph and electrical supplies, appliances and apparatus, and all things incident thereto; also the making of models and experimental work, and general light manufacturing, and all things incident thereto;"—the other "for the purpose of manufacturing, operating, selling or renting dynamos, motors and other electrical appliances for furnishing lights and power, and for other purposes,"—held to have no right to carry on the business of electrical illumination.

Corporations cannot be said to have "gone into operation" in the business of electric lighting, involving the necessary use of poles and wires in streets, when their only right to use the streets was derived, not by ordinance of the municipal authorities, supplemented by a popular vote, the only legal method of obtaining such permission, but from decrees of a probate court.

APPLICATION by an electric lighting company to make injunctions perpetual, restraining the defendant companies from placing and using cross arms upon plaintiff's poles.

Facts stated in opinion.

Champin & Williams, Draustin Wulstin, Jordan & Jordan, and Paxton & Warrington, for plaintiff.

Ramsey, Maxwell & Ramsey, for the Queen City Electric Co.; Pottinger & Pogne, for Jones Bros. Electric Co.

KUMLER, J.: The Brush Electric Light Company, plaintiff in the above actions, brings and prosecutes its actions in injunction against the Jones Brothers Electric Company

Electric Light Co. v. Electric Companies.

and the Queen City Electric Company. The petitions of the plaintiff are substantially alike in both cases. The Brush Company alleges that it is a corporation duly organized under the laws of Ohio, and doing business within this State, and that the defendant companies are likewise doing business in the State of Ohio. Plaintiff also alleges that the city of Cincinnati passed a certain ordinance on the 3rd day of March, 1882, by which it granted to it the right to erect poles and appurtenances necessary to carry on its electric business, and that it has the right by virtue of the terms and conditions of said ordinance to enjoy its rights thereunder free from all use and claims of said defendant companies: that under said ordinance it has erected a large number of poles in this city; that said poles and appurtenances are owned exclusively by the plaintiff, which is well known to defendants; that said defendants threaten to occupy and possess the same by erecting cross arms, and stringing wires thereon, without the consent of the plaintiffs or other rightful authority; that the capacity of the poles so erected is no greater than its business interests require; that the defendants' use and enjoyment of said poles in the manner threatened by it will work great and irreparable damage to the plaintiffs.

Wherefore plaintiff asks that an order may be granted restraining said defendants, their officers and agents, from using its poles in this city, and from interfering with the said business.

The defendant companies file separate answers, which are substantially the same. The defendants admit that plaintiff is an incorporated company, but deny each and every other allegation contained in its petition; they deny that the plaintiff is entitled to erect poles and to use and enjoy the rights conferred under said ordinance to the exclusion of said companies; they deny that said plaintiff is the owner of said poles, and that it alone is entitled to their use, and that defendants have no property or rights therein; they deny that the capacity of the poles erected

by the plaintiff is no greater than will be required by the business interests of the plaintiff. Defendants further answer, saying that the plaintiff obtained permission to erect and maintain the necessary number of poles and wires with which to furnish the city and its inhabitants with light by electric currents under said ordinance, subject to certain rules and regulations therein prescribed, which are set forth in the answers; that said Brush Company operated under its ordinance until 1889, but did but little if any work, and strung but few wires, until the year 1889; that in the years 1888 and 1889 various electric companies commenced business in this city, and obtained decrees through the Probate Court of Hamilton county, granting them the right to go upon the streets of the city, and to use and occupy the same for the purposes of their business, erect poles, etc., and string wires suitable to said business, but that all of said decrees subjected said companies to the supervision and control of the board of public affairs of said city; that the board of public affairs in July, 1889, adopted certain rules and regulations set forth in the answer, which stipulate that the board reserves the right if the interests of the city require it, to authorize other companies or persons to use plaintiff's poles for the same purposes upon payment to the owner of a proper compensation; that all permits thereafter granted will be subject to that condition; that the plaintiff, subsequent to the adoption of said rules, applied to the board for permission to erect poles and string its wires, filing with it plans showing the location of all poles, and afterwards obtained permits, and erected poles, and strung wires thereon, under the supervision of the board and its chief engineer; that the common council passed a general ordinance on the 18th day of October, 1889, prescribing certain terms under which electric companies may do business in the city limits; that by the terms of said ordinance the person, company or corporation erecting such poles shall upon payment to them of a fair proportion of the original cost of erection permit any other person or company to occupy and possess equal

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rights and privileges thereon, if said poles have not a full complement of wires ; that whenever two or more persons, companies or corporations are supplying electricity for any purpose within the same territory, they shall be required to jointly use the same poles upon the conditions therein recited ; that said plaintiff since the date of said ordinance has done business subject to the requirements of said ordinance ; that said board on January 30th, 1890, adopted a resolution fixing the basis upon which the different electric light companies shall use the lines of poles in the city, which is fully set forth in said answer ; that the Jones Brothers Electric Company obtained a decree from the Probate Court of Hamilton county, Ohio, on the 5th day of October, 1889, by which it was granted the right to occupy the streets of the city of Cincinnati, erect its poles for light and power purposes ; that it filed its bond and submitted its plans for the erection of poles as required by said decree, ordinance of October 18th, 1889, and the regulations of said board, and secured permits to erect its poles, string wires and do other work in accordance therewith, which it did, and is now doing ; that both of said companies obtained decrees from the Probate Court of this county to occupy the streets of this city for lighting purposes, and in all respects complied with said decrees, the general ordinance of October 18th, 1889, aforesaid, in regard to lighting, including the rules and regulations of said board ; that said defendant companies, desiring to occupy the plaintiff's poles, expressed their willingness and ability to pay the required price of five (\$5) dollars per pole, and to pay a reasonable monthly rental equivalent to a fair proportion of the original cost of the poles to be occupied ; that said plaintiff arbitrarily refused to come to an agreement, refused to recognize the authority of the board, and to comply with the general ordinance aforesaid in regard to lighting, and declined all offers and tenders of payment on the part of the defendant companies. That said defendant companies and the plaintiff are supplying electricity in the same territory ; that plaintiff's and

defendants' poles are contiguous at many points, and are sufficient for the needs and requirements of all these companies. That the use and occupation of said poles jointly will not interfere with the safe use of the same by plaintiff in its present or prospective business. The Jones Brothers Electric Company asks that the restraining order be vacated. The Queen City Electric Company asks the dissolution of the injunction, and also prays affirmative relief against the plaintiff upon its answer and cross petition.

To these answers the plaintiff files a reply denying each and every allegation contained in the answers, excepting the admission made therein of matters set forth in the petition.

The plaintiff offered in evidence its articles of incorporation, the ordinance of March 8, 1882, under which it operates, and rested its case.

The defendant companies, to maintain the issues upon their part, among other things offered in evidence the articles of incorporation, to which plaintiff objected, on the ground that the articles of incorporation do not empower them to supply electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places within the corporate limits of the city.

The defendant companies also asked their witness when the companies went into operation, to which question plaintiff objected. The court allowed the witness to answer against the objection of the plaintiff.

The witness then answered, "On January 1, 1889." Plaintiff then objected to the answer, and moved the court to strike out the answer. Are the acts of incorporation admissible in evidence for the purpose of showing that the defendant companies have the right and power to engage in the business of supplying electric light for the purpose of lighting the streets, squares and other public places and buildings in the corporation limits?

The articles of incorporation of the Jones Brothers Electric Company read as follows :

Electric Light Co. v. Electric Companies.

Said corporation is formed for the purpose of manufacturing, buying and selling and dealing in telegraph and electrical supplies, appliances and apparatus, and all things incident thereto ; also the making of models and experimental work, and general light manufacturing, and all things incident thereto.

The articles of incorporation of the Queen City Electric Company read as follows :

Said corporation is formed for the purpose of manufacturing, operating, selling or renting dynamos, motors and other electrical appliances for furnishing lights and power, and for other purposes.

As a general rule, corporations have such powers, and such only, as the act creating them confers, and are confined to the exercise of those expressly granted, and such incidental powers as are necessary for the purpose of carrying into effect powers specifically conferred. Acts of incorporation should be fairly and reasonably construed ; the leading purposes and objects to be accomplished, and for which the corporation is created, should be ascertained if possible. *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59.

After carefully reading the acts of incorporation, and paying close attention to the arguments of counsel, we have no difficulty in construing the articles of the Jones Brothers Electric Company. The claim is made that this act of incorporation clothes this company with the power of supplying with electric light the streets, squares and public places inside the city limits. The evidence already offered shows that the Jones Brothers Electric Company are now engaged in this enterprise. The words "electricity," "electric light and power," do not appear in this charter at all ; indeed, the word "light" appears only once, and it is used as an adjective, and not as a noun. But we are told that the power is lodged in section 3471, the decree of the Probate Court, the ordinance of council of October 18, 1888, and in the resolutions of the board of public affairs. These are plainly not the sources of power. The articles are absolutely silent on the subject and object of supplying electricity publicly or privately, in the streets or elsewhere.

The right to furnish electricity is neither expressed nor implied. The charter must be our guide. The language employed is plain and easily understood. The articles of incorporation quoted above lead us plainly to the conclusion that the Jones Brothers, under their charter, could only engage in manufacturing, buying, selling and dealing in telegraph and electrical supplies, and cannot engage in electrical illumination.

The same objection is made to the articles of incorporation of the Queen City Electric Light Company. These articles herein before quoted have been the subject of much controversy. If formed for the purpose claimed, they ought to be protected, and not destroyed. The articles read "formed for the purpose of manufacturing;" "manufacturing" means "making goods and wares from raw materials," — Webster. Manufacturing what? Dynamos, motors and other electrical appliances. What for? For furnishing lights and power, and for other purposes. "Appliances" means "the act of applying or the thing applied." Clearly "manufacturing dynamos, motors and other electrical appliances" will not confer the right to supply electricity. The same may be said of "selling or renting dynamos, motors and other electrical appliances for furnishing lights and power, and for other purposes." Then, if formed for "operating dynamos, motors and other electrical appliances for furnishing lights and power and for other purposes," does this confer the right to supply electricity. "Operating" means "acting, exerting, agency or power." Whether we read these articles in the manner we have read them or in the natural and ordinary way, we are still confronted with the phrase, "and other electrical appliances," which plainly relates to the main objects mentioned in the charter. In our judgment the corporation was formed, as the language plainly indicates, for the purpose of manufacturing, operating, selling or renting dynamos, motors and other electrical appliances. After a careful examination of the language of the Queen City

charter, we have come to the conclusion that it has no right to carry on the business of electrical illumination.

This brings us to the motion to strike out the answer of the defendant, witness, who was asked the question, "When did the defendant companies go into operation?" answered as follows: "They went into operation on the first of January, 1889."

Plaintiff's counsel claim that under the evidence already offered, the witness could not answer the question, the same being incompetent. The defendant companies claim that they did go into operation, and commenced business under their respective charters in January, 1889. The plaintiff's claim is, that as a matter of fact and law, the defendant companies did not go into operation at all. In order to appreciate and understand the force of the answer and the objection thereto, we must keep in mind the evidence offered by the defendants respecting the dates of their respective articles of incorporation and the dates of their respective decrees in the Probate Court in connection with sections 3550, 3551 and 2491 as amended March 1, 1889. The Queen City Electric Company filed its articles of incorporation December 31, 1887, and obtained its decree in the Probate Court April 29, 1889. The Jones Brothers Electric Company filed its articles of incorporation December 5, 1883, and obtained its decree in the Probate Court, October 5, 1889.

The nature of the contracts involving the use of the streets within the municipality, whether they relate to railroads, gas, water or electricity, are contracts if entered into on behalf of the city. *Cin. St. R. R. Co. v. Smith*, 29 Ohio St., 291. Council alone can make contracts involving the use of the streets, lands and public places in the corporation. It is conceded that the defendant companies never obtained any direct grant from the council to use its property for supplying electric light and power. Whenever it is desirable to use and enjoy the streets above or below the surface, the consent of the municipal authorities must first be obtained. This consent is usually obtained in the

form of an ordinance; and in all cases where gas, water and electric light and power are to be supplied through the streets and lands of the corporation, there must be an ordinance passed by the council, and that ordinance will not go into operation until the same has been submitted to the qualified voters of the city making the contract.

Two things are necessary in all contracts where the streets of the corporation are sought to be used for any of the purposes named in sections 3550, 3551 and 3471a. There must be an ordinance and a vote of the citizens of the municipality upon it. Whether such vote shall be taken before or after the passage of the ordinance is a question to be determined whenever it arises. In the case of *Lewis D. Campbell v. The City of Hamilton*, the court held that the vote of the people should follow after the passage of the ordinance.

Section 2550 reads as follows :

A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, town or township, may manufacture, sell and furnish the gas required therein for such or other purposes; and a company organized for the purpose of supplying the inhabitants of a city, village, town or township with water may sell and furnish any quantity of water required therein for such or other purposes: and such companies may lay conductors for conducting gas or water through the streets, lands, alleys and squares of such city, village, town or township, with the consent of the municipal authority of the city, village or town, or with the consent of the trustees of the township, and under such reasonable regulations as they may prescribe.

Section 3551 reads as follows:

The municipal authority of any city or village, or the trustees of any township in which any gas or water company is organized, may contract with any such company for lighting or supplying with water the streets, lands, lanes, squares and public places in such city, village, town or township; but no such company shall go into operation in any city or village where such a corporation has been already formed or is hereafter formed, until after the question of authorizing such operation has been submitted to the qualified voters of such city or village, and authorized by an ordinance.

Electric Light Co. v. Electric Companies.

On the 1st day of March, A. D. 1889, vol. 86, p. 63, the following amendment was passed amending section 2491 :

A municipal corporation may contract with such company for supplying with electric light, natural or artificial gas, for the purpose of lighting (or heating) the streets, squares and other public places and buildings in the corporation limits. But this section shall be subject to the restriction in the last clause of section 3551.

The language of section 3551 is very definite, and says :

But no such company shall go into operation in any city or village where such a corporation has been already formed, or is hereafter formed, until after the question of authorizing such operation has been submitted to the qualified voters of such city or village and authorized by ordinance.

It will be observed that the law of March 1st, 1889, makes contracts for electric lighting subject to restrictions in the last clause of section 3551, to wit: an ordinance and a vote of the people. "But no such company shall go into operation," means that all contracts provided for in sections 3550, 3551 and 2491 shall not go into effect until there is an ordinance and an affirmative vote upon it.

The defendant companies do not claim to have complied with the provisions of these statutes. The decrees of the Probate Court were obtained subsequent to the passage of the law of March 1st, 1889. The defendants obtained their rights to occupy the streets from the Probate Court, and not from the city.

The defendant companies did undoubtedly go into operation soon after they received their charters, in the sense of doing business. They might very properly supply themselves and their neighbors with electric light and power. But when they undertook to use the lands of the corporation, whether above or below the surface of such lands, for the purposes of electric lighting, could they be said to "go into operation" in the absence of a grant from the city? Going into operation means going into operation by virtue of a legal grant from the city for the purpose of supplying the streets and lands of the city with electric light and power.

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It is also claimed that the right is reserved in the ordinance of March 3rd, 1882, to allow other companies to go upon the poles of the Brush Company and the Cincinnati Electric Light Company, and that this right to other companies is conferred by the general ordinance of October 18th, 1889, subsequently passed, which was offered in evidence. I have examined these ordinances, and I cannot adopt that view of the case.

It follows, therefore, that the objection to the articles of incorporation will be sustained, and the motion to strike out the answer granted.

The Court: Gentlemen, if there is anything else, we will now hear what counsel have to say in the matter.

Mr. Wulsin: I think, your honor, we are entitled to a decree making the injunction perpetual.

Mr. Pogne: I think, your honor, this is in effect deciding that the Jones Brothers Company has no right to go upon these pole lines; the introduction of any further testimony would be, therefore, totally immaterial; the effect of the ruling is, the court would grant the decree anyhow.

Mr. Wulsin: You rest, in other words, and we rest.

The Court: In that view of the case, gentlemen, an order will be made overruling the motion to dissolve the injunction; the injunction will be made perpetual, and the answer and cross-petition of the defendant, the Queen City Company, in which it asks affirmative relief, will be dismissed, to which an exception will be taken if they desire

FORBES V. WILLAMETTE FALLS ELECTRIC COMPANY.*Oregon Supreme Court, March 31, 1890.*

(19 Oregon, 61.)

MECHANICS' LIENS.—POLES AND WIRES AS PROPERTY.

(Head-note by the court):

Poles set in the ground, connected together by wire in the usual way for the transmission of electricity for the purpose of light and power, constitute a structure, within the meaning of section 3669, Hill's Code, and a lien attaches for labor performed on such structure under employment by the contractor.

APPEAL from Circuit Court, Multnomah county.*J. C. Moreland*, for appellant.*G. D. Young*, for respondent.

STRAHAN, J.: This is a suit to enforce a number of liens for labor. It is alleged one Stromach had a contract with the defendant corporation to dig holes, and place the poles therein, and stretch the necessary wires on the same, from, at or near the city of Portland to a point at or near Oregon City. The said wires were to be used by the defendant corporation for the purpose of transmitting light and power from the company's works, at the falls of the Willamette river, to the city of Portland, and for other electrical purposes. The plaintiff, as well as the others whose claims were assigned to him, rest their claim to enforce this lien on the fact that Stromach had a contract with the defendant corporation to do the work which they performed and that he employed each of said parties, at a fixed rate of wages per day, to assist in its performance.

The plaintiff's right to the remedy which he seeks must depend upon the statute. Section 3669, Hill's Code, pro-

vides: "Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, and other persons performing labor upon, or furnishing material of any kind to be used in the construction, alteration, or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or super-structure, shall have a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, sub-contractor, architect, builder or other person having charge of the construction, alteration, or repair, in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act." The principal question litigated on this appeal is whether or not this statute gives a lien for labor against the property described in the complaint; in other words, do these poles planted in the ground, connected together with wires and insulators, constitute a structure, within the true intent and meaning of this statute? In answering this question, but little aid can be had from the decisions of other States; for the reason that no general principle of law is involved, and such decisions have generally turned upon the special or peculiar phraseology of the particular statute. Without attempting to indulge in any refined distinctions or definitions, and having in view the object and purpose of the enactment in question, I think it may properly be held that the poles, wires, insulators, etc., mentioned in the complaint, constitute a structure, within the meaning of the statute, and that the same is subject to a lien for labor performed thereon. In reaching this conclusion, we do not find it necessary to go as far as the court did in *Helm v. Chapman*, 66 Cal. 291 (5 Pac. Rep. 352), where it was held that a mine or pit sunk within a mining claim was a structure, within the meaning of the statute giving a lien on a building, improvement or structure.

* * * * *

Telephone Co. v. State, ex rel. Hopper et al.

NOTE.—See INDEX to this and previous volumes, title "Poles and wires as property."

In *Mulholland v. Thomson-Houston Electric Light Co.*, 66 Miss. 389, Apr. 23, 1889, held that an electric light plant furnished for lighting a steamboat comes within the terms of a lien law as "material furnished about the erection and construction, alteration or repairs of the boat."

THE CENTRAL UNION TELEPHONE COMPANY V. THE
STATE, EX REL. HOPPER ET AL.

Indiana Supreme Court, April 2, 1890.

(123 Ind. 113.)

TELEPHONE COMPANY.—DISCRIMINATION.—MANDAMUS.

A telephone company cannot evade a statute requiring it to furnish connections and facilities to all applicants within its territorial limits, without discrimination and at a fixed maximum rate, by adopting the "public stations" instead of the "rental" system.

Case of this series cited in opinion: *Central Union Teleph. Co. v. State*, ex rel. *Falley*, vol. 2, p. 27.

APPEAL from order of Circuit Court, La Porte county, overruling demurrer to complaint and sustaining demurrer to answer.

Facts appear in head-note and opinion.

A. A. Thomas and J. H. Baker, for appellant.

J. H. Bradley, J. A. Thornton and J. H. Orr, for appellees.

COFFEY, J.: This was a suit by the relators against appellant for the purpose of compelling the appellant to furnish relators the use of telephones.

The complaint alleges substantially that the appellant

is a corporation duly organized and doing business under the laws of this State, as a common carrier of telephonic messages in Michigan city, and has done business therein for the period of four years last past, during all of which time it has kept and now does keep and maintain in said city a telephone exchange for the use and benefit of the public and individuals therein, leases telephonic machines or instruments, grants telephonic facilities, including needful and necessary connections that subscribers and others may reasonably require and demand; that relators are residents of Michigan city, in said county, engaged in the wholesale and retail lumber business, and managing a planing mill in connection therewith, and that until about July 1, 1887, the appellant had leased them instruments, granted them telephonic facilities and connections at their mill and one at their office, since, and during the time said appellant had established its business in said city, the relators complying with all conditions imposed upon them; that about the 1st day of July, 1887, the appellant, without cause, and against the protest of the relators, removed the said instruments from the mill and office of the relators, severed all telephone connections, and refused to allow or grant them any telephonic service, though appellant did then maintain and ever since has maintained and kept a telephone exchange in Michigan city, leased instruments, and furnishes telephonic facilities for the public and individuals; that about July 14, 1887, the relators demanded of the appellant, which was then and there organized, existing, and doing business as a carrier as aforesaid, the use, possession, and enjoyment of two telephones, one at their office and one at their mill in said city, and necessary connection with other subscribers and firms therein, and offered then and there to pay the appellant, as rent or for the use of the same, the sum fixed by law, to wit, two and 50-100 dollars per month for each instrument, which demand and offer the appellant refused to accept or comply with, and refused said telephones and telephonic service, and still refuses the same; that the use of telephonic service to the relators in their

business is of great value, as well as convenience, and they are without power to compel the appellant to grant them the telephone facilities they need, and which it is the duty of appellant to give the relators; and that the injury and damage to them caused by the neglect and refusal of the appellant to perform its duties and obligations can not be estimated so as to give any exact amount, or lay the foundation for a suit at law for damages. The complainant prays that the appellant be compelled, by mandate, to furnish relators the required telephonic service.

The court overruled a demurrer to the petition and alternative writ of mandate, and appellant accepted.

The appellant answered, denying that it was a common carrier, but admitting that its business was in some respects of the nature of a common carrier, and that it was a *quasi* public corporation carrying on a telephone business in the said city, and so bound to furnish, under such reasonable rules and regulations as it might establish, telephone service to all persons impartially, and without discrimination, as far as practicable, but denying that it is bound to *rent* telephones at all, or as demanded by the relators, or for any fixed monthly rental, or for the exclusive use of any one; that it has not, since the 30th day of June, 1887, done so, nor does it now do so to any person in Michigan city; that after long trial and full experiment it found it could not rent telephones, with exchange service, at the price fixed by statute therefor, and for the compensation so received pay the expenses of so doing, and the royalties on the patents required therefor, and the necessary repairs and renewals and make any reasonable return on the capital invested in such attempts, and that it duly notified all of its subscribers in Michigan city that on and after June 30, 1887, it would not attempt longer to do so, but would, on and after said date, close its exchange and cease business in said city, unless a sufficient number of citizens therein should desire telephonic service, without any rental of instruments, and by means and use of a central toll station connected with local toll stations alone, whereat all practi-

cable telephone connections might be furnished by appellant and had and enjoyed by all persons, without partiality or discrimination, on payment of a toll charge or payment for each communication; that under said system coupons or a number of tickets would be sold for a greatly reduced price, which tickets should be good only if used within a limited time, and were good for use, not on any particular instrument, but on all telephones connected with said exchange, or any other of the many exchanges of the appellant in adjoining cities, or in said State of Indiana; that under said system telephones for such toll stations are established at such desirable points as the company may select, where responsible parties are found to act as agents of appellant in said business, under contracts of agency; that where such stations are not found to be sufficiently profitable they are to be discontinued, but that in establishing the same appellant requires that such coupon tickets, good as aforesaid, shall be purchased through the agent, in order to have assurance that such station will have business enough to justify maintaining it; that all said persons mentioned in said complaint as having in Michigan city telephone instruments in their possession, have them as agents of the appellant, under said system and contracts, and in no other way; that since the 30th day of June, 1887, the telephone business of appellant has been and is conducted under said system, and in no other way; that appellant offered to establish such toll stations upon relators' said premises, to be operated and carried on the same as others, but relators refused the same, or to sign said contract therefor.

To this answer the court sustained a demurrer, and, the appellant failing to answer further, the relators had judgment.

The assignment of error calls in question the rulings of the Circuit Court as above set out.

The case of *Central Union Telephone Co. v. State, ex rel.*, 118 Ind. 194, and the authorities there cited, is decisive of the case now before us. In that case it was

State, ex rel. Cable Co. v. Telegraph and Telephone Co.

held that, under the laws of this State, a person desiring the kind of telephone service here required could compel by mandate, the furnishing of such service, and that it was no defence to say that the person or corporation engaged in furnishing telephonic service did not rent telephones, but furnished such service by means of public stations only
 Judgment affirmed.

NOTE.—In another case having the same title, decided by the same court, June 26, 1890, and reported, 124 Ind. 600, the opinion was as follows:

OLDS, J.: This was a proceeding to compel the appellant, as a common carrier of telephone messages, by mandate, to furnish telephone service to the appellees, who were engaged in business in Michigan City. The pleadings are substantially the same, and the questions involved are the same, and arise in substantially the same manner as those presented and decided in the case of the *Central Union Telephone Company v. State, ex rel.*, 123 Ind. 113. The same questions were also involved and considered at length, and the authorities reviewed, in the case of *Central Union Telephone Company v. State, ex rel.*, 118 Ind. 194, and we do not deem it necessary to set out the record, and state the manner in which the questions arise. On the authority of the cases herein cited, this case must be affirmed.

Judgment affirmed with costs.

See note to next case.

STATE, EX REL. POSTAL TELEGRAPH CABLE CO. v. DELAWARE & A. TELEGRAPH AND TELEPHONE CO.

Circuit Court, D. Delaware, July, 1891.

(47 Fed. R. 638.)

TELEPHONE COMPANY.—CONTRACT FOR DISCRIMINATION.—MANDAMUS.

Telephone companies have assumed the character, functions and duties of common carriers, and thus made themselves subject to the same principles and rules of law applicable to all other common carriers, the chief one of which is that they must serve the public impartially.

Local telephone companies cannot, therefore, legally bind themselves by contract, even with the parent company which owns the apparatus leased to and used by them, to discriminate in favor of one telegraph

others to exercise their inventive faculties. He may dispose of his patented property or discovery in several different ways, and for distinct purposes and uses, and the law of Congress will protect him in the enjoyment of his rights, and save him from competition, during the life of his patent. At the same time, while he is thus favored, neither he nor his patented product is exempted from the liabilities and regulations which attach to all other persons and property under the general law of the land. An illustration of this qualified right of a patentee may be found in *Patterson v. Kentucky*, 97 U. S. 501. In that case the appellant had been convicted in the State court of selling an improved burning oil, of which he was the inventor, and which had been condemned by the State inspector as unsafe, but which the appellant claimed he had the right to sell by virtue of letters patent issued to him by the United States. The Supreme Court, speaking through Mr. Justice HARLAN, said :

“The right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few.”

The same doctrine was held in *Jordan v. Overseers*, 4 Ohio, 295, where the court said :

“A patentee has the power to manage his property, or give direction to his laborers, at his pleasure; subject only to the paramount claims of society, which require that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare.”

In each of these cases the patentee had attempted to sell his patented articles without regard to the provisions of the State statutes. It was decided that he could not do so, for the reason that, while a State law could not interfere with the right of a patentee in the possession of his

monopoly, it could control and regulate the application and use that might be made of the monopoly, and that in his management he was subject to the same responsibilities which are imposed on the owners of other kinds of property. In *Vannini v. Paine*, 1 Har. (Del.), 65, the facts were these: Yates and McIntyre were the assignees of Vannini, the inventor and patentee of the mode of drawing lotteries on the commutation and permutation principle, and were engaged in the business of drawing lotteries in Delaware. The defendants, who were also lottery brokers, had issued a scheme for drawing lottery on the plan of Vannini's patent. The complainants filed a bill for injunction, partly on the ground that the defendants were infringing the patent rights of Vannini. The chancellor had dismissed the bill for other reasons, and the Court of Errors and Appeals of Delaware, in affirming the decree, incidentally referred to the claim made under the patent, and said:

"At the time Yates and McIntyre made contracts for the lottery privileges set forth in their bill, we had in force an act of assembly prohibiting lotteries, the preamble of which declares that they are pernicious, and destructive to frugality and industry, and introductive of idleness and immorality, and against the common good and general welfare. It cannot, therefore, be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State merely because they have a patent for it under the United States. A person might, with as much propriety, claim a right to commit murder with an instrument because he had a patent for it as a new and useful invention."

The conclusion drawn from an examination of these cases is that the patent laws give to the patentee a monopoly in his invention, and afford him protection in its proper and legitimate employment; but that they do not authorize him to employ it for a purpose or in a manner that may be forbidden to all other persons in the use of their unpatented property or discoveries. Since the above decisions were

made, the telephone patents have come into general use, and the telephone, as an instrument for the rapid transmission and reception of messages, has been adopted by all classes of persons, in almost every department of business, public and private, and is now, within the scope of its power, as essential to the convenience and welfare of the public as are the railroad and the telegraph. The beginning, progress and completion of business transactions involving large interests depend upon the certainty of telephonic communication, which has been accessible to the public for such a length of time that any course of action by the owners of the telephone patents which might prevent or limit the general use of the telephone would produce the most serious consequences. Up to the present time the telephonic system has been, and continues to be, open to all persons and corporations, excepting telegraph companies, and the question now before the court is, has the respondent a right to exclude the latter; and the solution of this question depends upon another one: whether the telephone company has, intentionally or unintentionally, assumed the character, functions and duties of a common carrier, and thus made itself subject to the same principles and rules of law applicable to all other common carriers, the chief one of which is that they must serve the public impartially, and without unjust discrimination, to the utmost of their ability. That such duty is incumbent on every common carrier is elementary law, and will be admitted without discussion. It had its foundation in public right, which is superior to private interest. It has been said that a man is not compelled to put his property to public use, but that, when he does, the manner of its use may be controlled and regulated by law. Familiar examples of this proposition may be found in municipal ordinances and legislative enactments relating to hackney coaches, taverns, warehouses, ferries, etc.; and the doctrine has been fully considered and established by the Supreme Court of the United States in *Munn v. Illinois*, 94 U. S. 113. The controversy in that case originated in a statute

of the State of Illinois, which provided a maximum charge for the storage and handling of grain in warehouses and elevators appropriated to those uses in Chicago and other places in the State having not less than 100,000 inhabitants. Munn and Scott, the defendants below, being the owners of grain warehouses and elevators at Chicago, had violated the statute by neglecting to take out a license, and by charging more than the maximum rates; and on conviction of such violation in the court below to a writ of error to the Supreme Court on the ground, among others, that the statute was repugnant to that part of the first section of article 14 of the amendment of the Constitution of the United States, which ordains that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. In answer to this, the counsel for the State contended that warehouses for the storage of grain, in the manner business was conducted in Chicago, were engaged in a public employment, as distinguished from ordinary business pursuits, and in this regard they occupied a position similar to common carriers, who are held to "exercise a sort of public office," and have public duties to perform. Chief Justice WAITE, in delivering the opinion of the court, said:

"Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. This was said by Lord Chief Justice HALE more than two hundred years ago in his treatise *De Portibus Maris* (1 Harg. Law Tracts, 78), and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public convenience, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public,

for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control. * * * So, if one owns the soil and landing places on both sides of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of public authorities."

After alluding to the fact that the vast grain productions of seven or eight States of the west, and their transportation to the east, passed through and paid toll to the Chicago elevators, the opinion concludes the discussion of this point by saying:

"Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney coachman, pursues a public employment, and exercises a sort of public office, these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very gateway of commerce, and take toll from all who pass. Their business most certainly tends to a common charge, and has become a thing of public interest and use. Every bushel of grain for its passage pays a toll, which is a common charge, and therefore, according to Lord HALE, every such warehouseman ought to be under public regulation, viz., that he take but reasonable toll. Certainly, if any business can be clothed with a public interest, and cease to be *juris privati* only, this has been."

The opinion of the court in the case of *Munn v. Illinois*, shows how private property may become dedicated *sub modo* to public use, and thus be brought under public control; and it also decides that the limitation, by legislative enactment, of the rate of charge for services rendered in a public employment or for the use of property in which the public has an interest, established no new principle in the law, but only gave a new effect to an old one. The power

of the Legislature to regulate these rates may be abused, and so may its power to tax; but these are questions of expediency, to be determined ultimately by the people, who are the source of legislative authority ultimately. The law as announced in *Munn v. Illinois* was afterwards applied to a telephone company, in *Hockett v. State*, 105 Ind. 250 (5 N. E. Rep. 178), in which the Supreme Court of Indiana upheld a statute of that State limiting the rent to be charged for the use of a telephone to a sum not exceeding three dollars per month. The court decided that a telephone company was a common carrier in the same sense as a telegraph company, its instruments and appliances being devoted to a public use, so that the Legislature of a State could prescribe the maximum charges for its services. The case was approved and followed by the same court in *Telephone Co. v. Bradbury*, 106 Ind. 1 (5 N. E. Rep. 721), in which the same questions were discussed by able and distinguished counsel, and fully considered by the court. See, also, *State v. Telephone Co.*, 17 Neb. 126 (22 N. W. Rep. 237); and *Telephone Co. v. Falley*, 118 Ind. 194 (19 N. E. Rep. 604). The authorities last cited had reference to the right of individuals to the use of the telephone as a public system, which was open to all persons; but courts of this country, with perhaps a single exception, have extended the same right to telegraph companies, in every case in which the defenses now set up by the respondent were made and overruled. In *State v. Bell Tel. Co.*, 23 Fed. Rep. 539 (1885), in the United States Circuit Court for the eastern district of Missouri, the question was "whether the court could compel the defendant, managing the telephonic business in the city of St. Louis, to establish communication with any other individual or company than that permitted by its license from the patentee;" and Circuit Judge BREWER, in answering the question, said:

"A telephone system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier.

* * * The moment it establishes a telephonic system here it is bound to deal equally with all citizens in every department of business, and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service."

In *Bell Tel. Co. v. Com.*, 3 Atl. Rep. 825, the Supreme Court of Pennsylvania, adopting the able opinion of Judge ARNOLD in the court below, decided that the telephone company was a common carrier. A like decision was rendered in *Chesapeake & Potomac Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399, and in *Commercial Union Tel. Co. v. New England Telephone & Telegraph Co.* (Vt.), 17 Atl. Rep. 1071. Being a common carrier, the telephone company has not the right to discriminate in granting licenses for the use of the telephone instruments. It has already been noticed that the Western Union Telegraph Company is not the owner of any of the telephone patents, but only a licensee. Whatever claims that company had in the patents were transferred by it to the National Bell Telephone Company under the contract of November 10th, which provided that thereafter the telegraph company should have the exclusive use of the telephone for purposes of telegraphy. But the enforcement of this part of the contract would violate the rule that, when the use of a patented device is thrown open to the public, or to classes of the public, all are entitled to use it on the same terms as others in the same class; and, therefore, any contract or agreement which would effectually evade the rule must be declared void as being against public policy, both at common law and by statute.

The authorities referred to by the counsel for the respondent to support their theory, that a patentee can control the use of his patent, are especially applicable to patents and patented articles designed for private use. In the Vermont case, *supra* (17 Atl. Rep. 1071), the distinction between the law governing the private use of a patent

and the law governing its public use is briefly but clearly stated, and it was there said :

“Patents are property, and the right to sell or lease them is subject to the same restrictions as other property. The patentee cannot lease them for any use that contravenes principles of public policy. If he leases them for a public rather than an individual use, he thereby gives the use to the whole public. In this case the American Bell Telephone Company might have licensed its patent to the defendant so that the latter alone could have used it; but when it went beyond this, and licensed the defendant to use it for the public, it in fact licensed it for all who desired its use, and afforded compliance with reasonable conditions.”

That decision was rendered in 1889, and is the most recent one of the adjudications, on the questions now under discussion which have been brought to our notice. The decisions in the courts of Pennsylvania, Maryland and Indiana were made with reference to the statutes of those States which had been enacted for the regulation of telephone companies, limiting charges and prohibiting discriminations; but there is a concurrence of opinion in the conclusion that those companies are subject to the common law rules which pertain to all common carriers. In Nebraska and Vermont, in the absence of any general statutes on the subject, the courts have held the same doctrine.

The final position taken on behalf of the respondent is that, under the decision of the Supreme Court of the United States, in the *Express Cases*, reported in 117 U. S. 1 (6 Sup. Ct. Rep. 542, 628), the contract of November 10, 1879, is valid, and should be sustained. Those cases grew out of the applications of several independent express companies to compel certain railroad companies to carry their express matter and express agents. The applications were granted by the court below, but, on appeal, the Supreme Court held that the railroad companies were not required, by usage or by the common law, to transport the traffic of

independent express companies over their lines in the manner in which such traffic is usually carried and handled, and that the use of the lines might be given to one or more express companies, or withheld altogether. The evidence showed that the business between the railroad companies and the express companies had always been the subject of special contracts, which regulated the rates to be charged, and contained stipulations for the termination of the contracts. It also appeared that, with very few exceptions, only one express company had been allowed by a railroad company to do business on its road at one time. Chief Justice WAITE, in delivering the opinion of the court, said:

“The reason is obvious why special contracts in reference to this business are necessary. The transportation is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As these things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be especially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is express, it implies access to the train for loading at the latest, and for unloading at the earliest convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. * * * The car space that can be given to the express business on a passenger train is, to a certain extent, limited; and as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. * * * On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions where the public would be put to inconvenience by delays which could otherwise be avoided.”

The reasons assigned for the decision in the *Express Cases* do not apply, even remotely, to the right of telephone companies to make discriminations by special contract in the transmitting of messages. In the first place the relator is not asking for any special accommodation or service from the respondent, but for such facilities only as are given by the latter to the general public and to the Western Union Telegraph Company. These facilities are now actually furnished to other common carriers of every kind excepting telegraph companies, and the respondent is requested to do nothing more for the relator than it does for all of its patrons and subscribers. For want of a sufficient rolling stock, a railroad company may be unable to accommodate more than one express company on a single train. A telephone company is not prevented by any deficiency of appliances or of instruments from giving the same service to all, and finally, it is not claimed by the respondent that it cannot serve the relator in like manner as it does others without inconvenience or delay to the public.

From the foregoing review of the law, it follows that the respondent is a common carrier which has offered to the public the use of a telephonic system for the rapid conveyance of oral messages from one point to another; that one of the most important duties of a common carrier is that it shall serve all persons alike, impartially and without unreasonable discrimination; and that the performance of this duty cannot be avoided by a special contract made between the respondent or its licensor and one or more persons for the exclusive use of the system, such contract being void as against public policy; and that a patented device or devices, when employed for a public use, or by a common carrier in the prosecution of its business, will be subjected to the rules and regulations which govern unpatented property under the same circumstances. The reasons assigned by the respondent for its refusal to furnish the relator with a telephone are therefore insufficient, and it is ordered by the court that the writ of *mandamus* be awarded.

State v. Telephone Co. et al.

NOTE.— See INDEX to this and previous volumes, title “ Discrimination.”

This case was affirmed by the U. S. Circuit Ct. of Appeals, reported 50 Fed. R. 677; which will be printed in the next volume.

THE STATE, P. T. W. DUKE, JR., Prosecutor, v. CENTRAL
NEW JERSEY TELEPHONE COMPANY ET AL.

THE STATE, CHARLES G. FOSTER, Prosecutor, v. SAME.

New Jersey Supreme Court, February, 1891.

(58 N. J. L. 341.)

CONDEMNATION.— “ TELEGRAPH ” INCLUDES “ TELEPHONE.”

A statute authorizing the condemnation of land for telegraph purposes is broad enough to include telephone purposes also.

Certain questions of practice in condemnation proceedings considered.

Cases of this series cited in opinion: *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687; *Chesapeake & Potomac Teleph. Co. v. B. & O. Tel. Co.*, vol. 2, p. 416; *Atty.-Genl. v. Edison Teleph. Co., of London*, vol. 2, p. 440, note.

CERTIORARI to review an order of a justice of the Supreme Court appointing commissioners in a proceeding to condemn land for telegraph or telephone purposes. The facts are sufficiently stated in the opinion.

For the prosecutors, *Alfred Mills* and *Mahlon Pitney*.

For the defendants, *Theodore Little* and *Melville Egleston*.

The opinion of the court was delivered by REED, J.: The radical objection raised against the order in question is, that the Central New Jersey Telephone Company has not the power to condemn lands. The range of the objection is, either that this company has no corporate existence, or, if it has, it has no authority to condemn lands for other than telegraphic uses.

It is argued that this is an attempt to condemn for a use foreign to the corporate business.

To attain a clear view of the foundation upon which the argument leading up to this alleged conclusion rests, it is essential that the legislation relating to telegraph and telephone companies should be passed in review.

The original act entitled, "An act to incorporate telegraph companies," passed in 1853, another act entitled "An act relating to telegraph companies," passed in 1855, and a supplement to the first mentioned act, which supplement was passed in 1866, were revised and consolidated in 1875 in an act entitled "An act to incorporate and regulate telegraph companies." *Rev. p.* 1174.

This act provides for a subscription of one-third of the capital stock necessary to be issued for the construction of a line of telegraph; for depositing with the Secretary of State a description of the line and the localities which it is intended to traverse; the capital of the company; its corporate name. It provides that upon compliance with these conditions they shall become a body corporate.

The act contains directions for organization and other matters not material to the question in this case.

In 1890 (*Rev. Sup.*, *p.* 1022) a supplement to this act was passed. It provides that any telegraph or telephone company organized by virtue of the act last mentioned, or by virtue of any special act, may apply to the common councils * * * for a designation of streets through which poles may be placed. It further provided for a condemnation of a right of way by such companies.

Then follows a supplement in 1882 (*Rev. Sup.*, *p.* 1023) which provides that "any telegraph company incorporated under the telegraph act may construct its line by means of underground cables containing wires."

Then follows a supplement in 1887 (*Pamph. L.*, *p.* 119), which provides that when any telegraph or telephone company, organized under the telegraph act or any special act, shall make an application to certain legislative bodies of municipalities to designate a route through the streets, it

shall be the duty of such legislative body to make such designation in writing.

Then follows a supplement in 1888 (*Pamph. L.*, 546), which provides that a circuit judge may, in certain cases, make such designation of streets upon a petition filed by such telegraph or telephone company.

The final supplement to the telegraph act is that of 1890, *Pamph. L.*, p. 489. The first section of this act provides a detailed scheme for condemnation of routes along roads by any telegraph or telephone company.

The second section declares that the provisions of the act to incorporate and regulate telegraph companies and its supplements shall extend to all telephone companies heretofore organized under that act.

From a glance at the last supplement set out, it is apparent that the last section of that act, if valid, contains a plenary grant of power to condemn.

It confers, in explicit terms, upon all telephone companies organized under the telegraph act, the same power of condemnation possessed by a telegraph company incorporated under that statute.

This section is attacked upon the ground that it is a palpable infringement of the first subdivision of paragraph 4, section 7, article XIV, of the amended Constitution.

It is urged that the legislation contained in the second section is concerning a subject foreign to the title of the act, that it is an attempt to amend the telegraph act by reference to its title only, and by providing that the provisions of that, the telegraph act, shall be a part of the section, without setting out in full the statute as amended.

I do not regard the settlement of the constitutional question thus mooted essential to a decision of this case. I am of the opinion that the right to condemn, set in motion by the petition and order brought up, can be vindicated by an appeal to other legislation.

I think that a telephone company can be incorporated under the original revised act to incorporate and regulate

telegraph companies. To state the proposition in another way, I think that the operation of a line of wire for a telephonic service, by a company organized under this act, is not *ultra vires*. If this be so, then a condemnation for a telephone line is within the power granted in the act.

The telegraph act does not define the kind of business in which the corporation shall engage, apart from the provision the corporators shall subscribe stock for the construction of a telegraph line. The name of such corporation need not indicate the business proposed to be transacted. Any title can be adopted. The only limitation upon the scope of the business is, that it must be within that for which a line of telegraph, in performing its public functions, is used.

It appears from the petition in this case that the objects of the corporation, and the purposes for which it was formed, are to build and construct a line of telegraphic or telephonic communication, or both.

The existence of the corporation for telegraphic purposes, as originally exercised, cannot be denied. Can it condemn also for a line to be devoted wholly or partly to telephonic service?

I think so, because the discovery of this vocal method of communication, and its application to the purposes of the speedy transmission of intelligence, was but a change in detail, but not in substance, of the business for which these companies were clothed with corporate privileges.

They are both services of a public nature which would permit the legislation to confer the power to condemn for each use. They are both designed to convey intelligence between distant places. So far as the owner over whose land their tracks or routes lie, they each are operated with the same appliances. Poles and wires, placed alike, impose exactly the same servitude upon the land. With the change in the apparatus at the *termini*, telegraphy becomes telephony.

The former makes the distant message intelligible by words, marks or sounds, the latter by sounds alone.

The same electric fluid is the medium of transmission, and all the inter-terminal structure is the same in both. A corporation employing either means of communication is executing substantially the same public function in substantially the same way. The business conducted in either way is within the purpose for which the statute was enacted.

The substantial identity of these methods of transmitting thought is not a novel view of their character.

The notion of the discoverer of the newer method seems to have been that it was a new use to which the system of telegraphy could be applied.

Mr. Bell's specification of his claims in his first petition for a patent is set out in full in the statement of facts prefixed to the opinions in the *Telephone Cases*, 126 U. S. 1. In it he says: "What I claim is (5) the method for an apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations similar in form to the vibrations of air accompanying the said vocal sounds."

Judicial sentiment, whenever an occasion has arisen for its expression, has uniformly been in the same direction.

In the case of the *Attorney-General v. Edison Telephone Company of London*, 6 Q. B. D. 244, the court were called upon to consider the relation which the two systems of communication bore to each other, in respect of identity of operation.

Certain acts passed before the invention of the telephone conferred upon the postmaster-general of Great Britain the exclusive privilege of transmitting telegrams within the United Kingdom, and of performing all the incidental service of receiving, collecting or delivering telegrams. There were in the acts certain definitions of what should be included in the words "telegraph" and "telegram," but all these definitions were descriptive of a telegraphic service by signaling. The question was, whether the telephonic transmission of intelligence by the Edison telephone company was an infringement upon the monopoly previously granted to the postmaster-general.

In an opinion by Mr. Justice STEPHENS, the scientific methods and mechanical appliances employed by each were reviewed in an exhaustive opinion. He sums up his observations by saying: "We are of opinion, then, that fully admitting all that has been, or, indeed can be said as to the novelty and value of the telephonic transmitter and receiver, the whole apparatus, transmitter, wire and receiver, taken together, form a wire used for the purpose of telegraphic communication, with apparatus connected therewith for telegraphic communication."

Again, he says: "The great object of the act of 1863 was to give special powers to telegraph companies to enable them to open streets, lay down wires, take land, suspend wires over highways, connect wires, erect posts on the roofs of houses, and do many other things of the same sort. The act was intended to confer powers and to impose duties upon companies established for the purpose of communicating information by the action of electricity upon wires, and absurd consequences would follow if the extent and nature of those powers and duties were made dependent upon the means employed for the purpose of giving the information."

Samples of absurd situations resulting from such a rule are then given.

In the case of *The Wisconsin Telephone Co. v. The City of Oshkosh*, 62 Wis. 32, a telephone company had organized under a general act authorizing the formation of corporations for the purpose of building and operating telegraph lines, or conducting the business of telegraphing in any way, or for any lawful business or purpose whatever, except certain kinds. The question was, whether this company was a corporation, so as to be relieved from immunity from a municipal tax. It was held that it was a valid corporation, and it seems to have been so regarded because of the similarity of the two kinds of service. There is no doubt as to the view of the court, that had the act concerning the formation of telegraph companies not contained the clause

"or any lawful business," &c., the result would have been the same.

In the case of *The Chesapeake & Potomac Telegraph Co. v. Baltimore & Ohio Telegraph Co.*, 66 Md. 339, a *mandamus* was applied for by one corporation against another corporation, both of which were organized under an act for the incorporation of telegraph companies. The respondent was organized as a telephone company. The question was, whether it was a corporation subject to the provisions of an act compelling telegraph and telephone companies to receive and transmit messages.

"It is clear," says the chief justice, "if we take the term telegraph to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, that term is comprehensive enough to embrace the telephone. Notwithstanding the appellant was organized as a telegraph company under the General Incorporation Law, it is authorized to do a general telephone business."

No one can read the line of argument by which the conclusions in these cases were reached without perceiving a consensus of judicial opinion, that the device introduced by the discovery of the electric transmission of sounds is but a novel method of accomplishing the object for which telegraphs were erected, and that a corporation erected under an act which empowers it to conduct a line of telegraph, can conduct it by means of a system which, for philological and scientific distinction, is called a telephone.

In this view I concur.

The improvements, indeed the revolution in the methods of transacting the business of each of the great corporations, has never given rise to a suspicion that the use of these additional means of accomplishing its corporate purpose was not within the limits of its corporate functions.

The roadbed of a railroad is used for a score of purposes which were not thought of in connection with the management of a railroad when the older charters were granted. Because such a company erects a telegraph line upon its

roadbed, no additional servitude is imposed upon the land, because the use of the line is incidental to its business.

Or imagine an occurrence more analogous to the present ; if railroads should abandon steam as a motive power and introduce another not more dangerous, I have no notion that its use would be *ultra vires*, or that the power to condemn land for a railroad to be so operated would cease to exist under our general railroad act.

I conclude that the Central New Jersey Telephone Company was a legal corporation possessing all the privileges, including the right to exercise the power of eminent domain, which was conferred by the telegraph act and its supplements.

I have not thought it necessary to consider how far those supplements to the act to incorporate telegraph companies, which seem to recognize the existence or the right of telephone companies to organize under it, would aid an arriving at the conclusion reached.

That a grant of power to execute a telephone business must be conferred under an act entitled "An act to incorporate telegraph companies," there can be no doubt at all.

These supplements contain no grant of a franchise, but they do contain a recognition of a right in a corporation organized under a telegraph act to do a telephone business, for this is what the recognition of the right of telephone companies to exist under the act amounts to. These supplements are acts *in pari materia*, and indicate the legislative intent in respect to the meaning to be attributed to the act providing for the operation of a telegraph line. Where such meaning is a subject of doubt, such a construction has its significance.

The limitation upon the force of such construction is, that it must be one of which the word or phrase is capable, and not a forced and unnatural construction.

The effect of such consequent acts *in pari materia* with the original, in this respect, was discussed by Mr. Justice WAYNE in the case of *The United States v. Freeman*, 3 How. (U. S.) 557, and many cases were cited.

But, as already observed, I do not think it necessary to invoke the aid of these acts in reaching the result already announced.

It is again insisted that there is a defect in the petition filed and in the order made thereon, because the petition prays for the condemnation of a right of way across land of two persons, each person having no interest in the land of the other. The petition seeks an appointment of, and the order appoints, commissioners to condemn a route across the land of Mr. Duke, and also a route across the land of Mr. Foster. I think that there is no substance in this criticism of the papers.

The first section of the act of 1880 (*Pamph. L.*, p. 201), as well as the first section of the act of 1890 (*Pamph. L.*, p. 489), provides that the names of any number of owners or any number of descriptions of the premises desired may be mentioned in one petition.

The counsel for the prosecutors contend that this provision means, that in case there are several owners of the same piece, having common interests, or there are several pieces belonging to the same owner, then all such owners and all such pieces may be included in one petition. The meaning of the provision is not so confined. The inclusion of several owners of the same piece of land was common and legal without the aid of this statute. The provision was adopted to avoid the trouble and expense of several proceedings against distinct owners, and to authorize that which has been done in this case.

It is again objected that the petition and order do not describe the line of telephone poles and wires, nor the premises to be occupied thereby, nor sufficiently describe the rights to be acquired by said company.

There was a map filed with the petition and referred to in the petition as a map which the petitioner prays may be considered as forming a part of the petition. The petition states that the map correctly exhibits the road adjoining the lands of prosecutors and location of the poles; that the location of each pole is indicated in a small circle of black

ink, which circle is numbered in red ink from one to twenty-seven, which is the total number of poles to be erected ; that the distances between said poles are indicated by figures in black ink between the circles ; the distance of the poles from the fence on the southerly side of the highway is indicated by figures in black ink beside each circle ; the distance of the poles from the fence on the northerly side of the highway is indicated by figures in or about the center of the highway.

The description contained in the petition, as already set forth in connection with the map so filed, admittedly contains a very definite description of the burden to be imposed upon the land. The objection urged is, that the map was not physically attached to the petition. It would have been well to have so attached it.

But it accompanied the petition, was marked with a letter mentioned in the petition as distinguishing it, and it could not have been overlooked or mistaken for anything other than a part of the petition.

I think the description thus given conformed to all legal requirements.

The result is, that both writs are dismissed.

NOTE.—See INDEX to this and previous volumes, title "Telephone and telephone companies."

THE CITY OF RICHMOND.

WESTERN UNION TEL. CO. v. INMAN & I. S. S. Co., Limited.

INMAN & I. S. S. Co., Limited, v. WESTERN UNION TEL. CO.

District Court, S. D., New York, June 24, 1890.

(43 Fed. R. 85.)

POST-ROADS ACT.—WIRES OBSTRUCTING NAVIGABLE STREAM.

The wires of the Western Union Telegraph Company are carried across the Hudson river from New York to Jersey City, by means of cables carried above the solid bed of the river, in "navigable mud" which abounds there.

The propeller blades of a steamship of the Inman line, just in from Liverpool, while navigating this mud, as large vessels were wont to do, fouled with and broke a large number of the cables, and the vessel also sustained considerable injury.

Cross actions were brought by both telegraph and steamship companies, to recover, each from the other, for the injuries thus sustained; the telegraph company claiming that under the act of Congress of 1866 (U. S. R. S., sec. 5268, *et seq.*), it had the right to maintain its wires anywhere beneath the water of the river, and thus was rightly in the mud, though it was "navigable;" and the steamship company relying on the provision of said statute that the wires must be so placed as not to interfere with navigation, and claiming the right to navigate mud as well as water.

The contention of the steamship company was sustained.

Case of this series cited: *Blanchard v. W. U. Tel. Co.*, vol. 1, p. 176.

IN admiralty. Cross libels. Facts stated in opinion.

Dillon & Swayne, for respondents.

Biddle & Ward, for libelants.

BROWN, J.: The above cross-libels were filed to recover the damages sustained by the respective parties through the fouling of the propeller blades of the steamer City of

Richmond with the submerged telegraph cables of the Western Union Telegraph Company a little outside of the end of the pier of the Dutch Steamship Company at Jersey City, in the North river, on the 19th of August, 1887. The telegraph company had 21 cables running under the North river at Cortlandt street, New York, connecting with the wires at Jersey City. The cables were run under the stringers of the pier, and made fast to several spiles under the pier at about low-water mark, mostly about 50 feet inside of the exterior end of the pier. They were laid from the New York end, being reeled off from a drum carried by a boat crossing towards the Jersey side. When brought to the spiles under the pier, they were pulled in as tightly as five or six men could pull them, and then made fast.

The waters of the North river are constantly depositing more or less of a fine sediment. The deposits are most copious on the Jersey side, where a slight bank of mud is thereby formed in front of the piers in question, and at a little distance from them. The deposits are of every degree of consistency, from muddy water down to the solid bed of the river. It is the ordinary practice for vessels of deep draught, in going in and out of the slips in that vicinity, to plow more or less through this navigable mud. On the 19th of August, 1887, the City of Richmond, having just arrived from Liverpool, finding that her slip, which was immediately below the Dutch pier above referred to, was full, so that she could not then get a berth, rounded to in the flood tide, and landed her cabin passengers at the end of the pier below, and then proceeded to back away from the end of the pier, in order to come to an anchorage for the purpose of transferring her steerage passengers bound for Castle Garden. While backing through this mud, her keel and propeller blades caught the cables running through the mud, and became badly entangled in them. Twelve of the twenty-one cables were broken. Some became so firmly wound around the propeller and shaft that it was necessary to dock the steamer in order to clear them, to her damage, as alleged, of \$2,000. The cost of repairing the cables is

alleged to be \$10,789, and the telegraph company claims \$50,000 in addition for the loss of the use of the same during 16 days.

The act of Congress passed July 24, 1866, (Rev. St. U. S. § 5263), authorizes any telegraph company to "construct, maintain, and operate lines of telegraph over, under or across the navigable streams or waters of the United States," provided they are "so constructed and maintained as not to obstruct the navigation of such streams or waters." The libel of the telegraph company alleges that the cables were "laid and maintained upon the bed of said stream so as not to interfere with the navigation of such stream;" that the location and use of the cables thus laid were well known to the owners of the steamer, their agents and servants; and that their loss and damage were caused by the steamer's wrongful and negligent attempt to navigate in the vicinity of said cables when the tide was low, and when there was not water of sufficient depth to float her without coming in contact with the bed of the stream. The libel and answer of the steamship company allege that the place where the cables were laid is constantly used by steamships and other vessels engaged in carrying on commerce and navigation on the Hudson river; and that, although there is not much water there for vessels of large size and deep draught, the said cables were laid without any protection whatever, and with nothing to indicate the place where they lay; that the steamer was managed with all proper care, and that the loss was caused by the wrongful obstruction of navigation by said cables, and by the careless and improper manner in which the cables were laid, rendering navigation dangerous and unsafe. The evidence shows that each cable was about one and one-half inches in diameter, and, running a mile in length from pier to pier, weighed about 8 tons; that at the exterior end of the Dutch pier the cables were raised several feet above the muddy bottom, but struck the mud about 20 feet outside of the pier, and thence sank deeper in the mud as they extended outward in the stream, going, so far as the

evidence shows, about a foot and a half deep. The master and the pilot in charge of the City of Richmond testify that they had no notice of the cables, or of their position, and that there was no sign at the pier indicating their presence. More or less of such cables had run to this pier since 1867. Trouble from anchors fouling was not uncommon but there were few instances of difficulty from vessels.

The steamer at this time drew 24 feet of water. The tide was ebb, about half out. The steamer, after discharging her passengers, could not remain at the end of the dock, because she would have been strained by taking the uneven ground at low water. She could not move ahead, and was therefore obliged to back. For that purpose her stern was swung out into the river by two powerful tugs, until she made an angle of about five points with the line of the shore. In doing this her stern was brought into the mud of the bank outside, above referred to, and two hawsers were parted in bringing her stern round to that angle. This angle was thought sufficient by the pilot, and was probably as much as her stern could be swung to port. She was then backed, as above stated, reaching the middle of the river without her officers at the time knowing that the fouling had occurred. Large steamers had long been accustomed to come to the docks in that vicinity. To run through more or less of such mud in doing so was and is an ordinary occurrence.

The telegraph company contend that they had a right to the use of the bottom of the river as a bed for their cables; that when laid on the bottom, under the act of Congress, the cables were lawfully there; that, if they are maintained there, the company discharges its full duty, and that other parties interfering with them do so at their own peril; that the bottom of the stream is, in all cases, the limit of the rights of navigation; and that the prohibition of any "obstruction" in the act of Congress does not embrace mere inconveniences to which vessels may be subjected by the cables, but refers only to those permanent conditions which prevent navigation, and not merely incommode it.

An elaborate brief has been filed, and numerous cases cited in support of these contentions. Most of the cases cited refer to highways and bridges, or other authorized structures, in which the acts authorizing such structures have been held not to regard the occasional or minor inconvenience that may incidentally arise. Only two cases have been referred to that deal with the fouling of cables by vessels, viz., that of *Stephens & C. Transp. Co. v. Western U. Tel. Co.*, 8 Ben. 502, and *Blanchard v. Telegraph Co.*, 60 N. Y. 510, in both of which the cables were found to be an obstruction to navigation, the evidence in both showing that they ran above the bed of the stream.

As applied to navigation, I cannot sustain the distinction contended for between an obstruction and an interference. The cables, whatever their exact position was, were in a permanent position. If they interfered at all with the rightful or necessary use of steamers in that locality, the interference was also permanent. And a permanent interference, which prevents a vessel from going where she ordinarily has a right to go, and where in her manœuvres she may find it necessary to go, whether that necessity be constant or frequent, or only occasional, as emergencies may compel her, seems to me to constitute an "obstruction." The libel alleges that the cables as laid did not "interfere" with navigation. ALLEN, J., in the case of *Blanchard, supra*, citing *People v. Vanderbilt*, 26 N. Y. 287, says:

"The Hudson river, at the point of the injury, is a public navigable stream, and those navigating it for commercial purposes, and using it as a highway for vessels, have the primary and paramount right to it, and every interference with or obstruction of the navigation, or hindrance to the free passage of vessels upon it, is *prima facie* a nuisance and unlawful."

Continuing, he observes that, while minor obstructions and temporary inconveniences are made lawful and tolerated, the necessary obstruction should "in every case be reduced to its minimum," and that, "if there is an unnece-

essary interference with navigation, the act becomes unlawful by reason of the excess of the limits within which obstructions are allowed, in the interests of the public. * * * From the evidence in this case," he continues, "it is quite evident that the wires and cables, in making continuous telegraph lines, can be so placed in the bed of the stream * * * as not in the least, or under any circumstances, to interfere with the unobstructed use of such streams for the purposes of navigation. * * * It can only be when improperly laid, or they have become displaced, that vessels adapted to the navigation can come in contact with, and either cause injury to or receive injury from them. * * * Telegraph cables so laid * * * as to * * * come in contact with vessels navigating the stream with such draught as the depth of water will permit, and which, but for such cables, would pass without difficulty or interruption, are improperly placed, and do injuriously interrupt navigation."

These principles seem applicable to this case, and to be sufficient for its determination. The soft, yielding, navigable mud, in which these cables were more or less immersed, is not to be confounded with the solid bed of the stream referred to in the above cases. Such mud constitutes no sharply defined bottom. It changes from time to time, and is dredged out as occasion requires. It admits of navigation by steamers through it, and forms a part of the available draught of water, and as such it is counted on and constantly used. The line of division between such navigable mud and the true bottom is distinguishable by on other test than the practical one of the ability of the ship to plow through it. So far as affects the rights of navigation, whatever depth of mud of this variable consistency steamers are accustomed to plow through, and do and must plow through, in the course of their manœuvres in and about the docks, is to be treated as a part of the stream, and not as a part of the solid bottom.

No doubt complaint cannot be lawfully made of incon-
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veniences that arise *necessarily* from the laying of cables pursuant to the act of Congress; but there is no evidence, nor can it be inferred, that this obstruction or interference with the backing of steamers through the soft mud was necessary. Not only were no pains taken to sink the cables below the depth of silt that vessels might use, but the cables were not allowed to sink the distance that their whole weight would carry them, since at the end of the wharf they were raised up so as to be several feet above the mud.

The telegraph company's contention amounts to this: that it has a right to the exclusive use of the silt or mud for its cables, without interference from vessels. Such, however, is not the language of the act of Congress. That act permits the cables to go "under water" but "not so as to obstruct navigation." Nothing in the act gives any absolute right to lay cables in all cases on the very top of even a solid bottom. A cable so laid would not perfectly meet even the language of the statute, for it would still be in the water, and not, as the statute says, "under the waters." Circumstances might exist where, if it were reasonably practicable, the cables would be required to be laid below the surface of even a solid bottom; or, as ALLEN, J., says, "in the bed of the stream," and not merely on the surface of the bed.

The language of the act should, however, be construed in reference to the practical objects in view, viz., to facilitate communication by cable on the one hand, while not permitting the obstruction of navigation on the other. When cables can reasonably be laid so as not to interfere with navigation, plainly they must be so laid. In mud of such varying consistency as lines the shores of the North river, there can be no practical difficulty in sinking cables so deeply as not possibly to interfere with the movements of vessels in any and all emergencies of navigation. The use by steamers in this harbor of the undefined margin of silt between the solid ground and clear water is necessary. Every inch that can be utilized is needed, and should be

scrupulously preserved for the uses of navigation, as against all unnecessary interference. Any unnecessary interference with the free movements of vessels is, in my judgment, an "obstruction to navigation" within the meaning and the intent of the act of Congress.

I must find that there was no necessity for these cables being where they were, and that the telegraph company, under the act of Congress, was bound to lay them deep enough, as they easily could have done, not to interfere with steamers, to whatever depth of navigable mud and water they might plow through. On this ground, without considering the question of notice, or lack of notice, of the existence of the obstruction, by a proper sign upon the adjacent dock, the libel of the telegraph company is dismissed, and that of the steamship company sustained with costs.

NOTE.—See *Blanchard v. W. U. Tel. Co.*, vol. 1, p. 176.

UNITED STATES V. UNION PACIFIC RAILWAY CO. ET AL.

Circuit Court, S. D., New York, February 16, 1891.

(45 Fed. Rep. 221.)

GOVERNMENT TELEGRAMS.

Between certain points on the line of the Union Pacific Railroad, both the railroad company and the Western Union Telegraph Company had lines of wires. By agreement, during the time in question the lines of the two companies were operated jointly, by agents jointly employed; each company, however, reserving to itself the exclusive use of certain wires. Each company was, by statute, in consideration of property and privileges granted, bound to transmit government messages upon special terms and conditions; the railroad company at usual rates, but the payment to be applied upon certain bonds which it had received from the government; the telegraph company, at rates fixed by the postmaster-general.

United States v. Railway Co. et al.

In an action brought to recover the aggregate moneys which had been paid for the transmission of a large number of telegrams sent by government officials, upon the ground that they should have been sent under the railway rather than the telegraph statute or contract, the government, plaintiff, was defeated; it appearing that the messages were delivered for transmission upon blanks of the telegraph company, paid for at the rates fixed by the postmaster-general, pursuant to the telegraph companies' act, and no demand or request made or information given that they were to be sent over the railway rather than the telegraph co.'s wires.

AT law.

Edward Mitchell, U. S. Dist. Att'y.

Artemus H. Holmes, for the Union Pacific Railroad Company.

Rush Taggart and *C. J. M. Gwinn*, for the Western Union Telegraph Company.

LACOMBE, Circuit Judge: The exhaustive arguments of counsel have covered a much broader field of discussion than seems necessary for the determination of the case. The claim is for \$12,495.62, being the aggregate amount of various sums of money paid by different officers of the government to the Western Union Telegraph Company for the transmission of telegraphic messages over the line of the Union Pacific Railroad Company from Counsel Bluffs to Ogden, and from Kansas City to Boaz. The railway company, or its predecessors in interest, whose obligations and liabilities it has assumed, received from the government large grants of land and bonds, under the acts of 1862 (12 St. U. S. 489), and 1864 (13 St. U. S. 356), to aid in the construction and maintenance of railway and telegraphic lines west of the Mississippi river. By virtue of section 6 of the act of 1862, above named, it was provided that, in consideration of the grants of lands and bonds to aid in the building of railroad and telegraphic lines, the companies receiving the same should (among other things),

Keep the telegraph line in repair and use, and should at all times transmit dispatches over said telegraph line * * * for the government whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same, * * * at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service.

All compensation for such services rendered for the government were to be applied to the payment of the bonds and interest until the whole amount was fully paid. By section 15 of the act of 1864, above mentioned, the several companies named (including the defendant railway company's predecessors) were required to use their telegraph lines for all purposes of communication, so far as the public and government are concerned, as one continuous line; and the proprietor of any line of telegraph authorized by the act was forbidden to refuse or fail to convey for all persons requiring the transmission of news and messages. Under these acts it was the duty of the defendant railway company to be prepared at all times with the requisite facilities to carry out these obligations, and to transmit dispatches for the government, whenever required to do so by any department thereof, at the rates provided for.

Further provision for securing to the government superior telegraphic facilities was made by Congress in the act of July 24, 1866, and subsequent acts (now found in sections 5263-5268 of the Revised Statutes), whereby the use of portions of the public domain, and of materials taken from the public lands, was accorded to any and all telegraph companies organized under State laws for the construction, operation and maintenance of their lines of telegraph. These privileges were conferred only on such companies as should file with the postmaster-general their written acceptance of the restrictions and obligations required by the act. Among these obligations was that of transmitting government dispatches over their lines at rates to be fixed by the postmaster-general. The section reads as follows :

Sec. 5266. Telegrams between the several departments of the government, and their officers and agents, in their transmission over the lines of any telegraph company which has been given the right of way, timber, or station lands from the public domain, shall have priority over all other business, at such rates as the postmaster-general shall annually fix.

Prior to the sending of the dispatches covered by the complaint, the Western Union Telegraph Company had filed such written acceptance. During all the time covered by the claim of the complaint it maintained and operated (as set forth below) lines of telegraph between Council Bluffs and Ogden, and between Kansas City and Boaz. The postmaster-general, from time to time, fixed the rates for transmission of government messages, as provided by section 5266. The amount claimed in the complaint is arrived at by a calculation in which these special rates are employed, and is very much less than it would be if calculated at the ordinary commercial rates prevailing along those lines at that time. At the time, then, that the dispatches which are the subject of the action were sent, the government was entitled, over the lines above referred to, to call upon either of these defendant corporations to take and transmit the same in accordance with the obligations into which such corporations had entered, in return for government aid. It had its choice of agencies. The defendants do not dispute the proposition that, had the government officer who sent the dispatch required the agent who received it to send it by the railway wires, the provisions of the railway acts, above referred to, as to rate and distribution of the proceeds, would apply. Nor, on the other hand, can it be disputed that, if such officer had delivered the dispatch to the agent of the telegraph company for transmission as a government telegram at the rates fixed by the postmaster-general, it would have been the duty of the telegraph company to give it priority, and to transmit it at those rates, under the provisions of the telegraph acts. As matter of fact, all of said messages were delivered to the Western Union Telegraph Company by the agent or officer of the government sending the same, written upon the

Western Union Telegraph Company's blanks, and each one directed to the receiver of such message at the point of destination and, without any direction to transmit the same over the bounded portion of the line of telegraph of the Union Pacific Railway Company for the whole or any part of the distance. The compensation for each of the messages was computed and paid for, as one entire service, (whether it was wholly, or partly only, over the lines from Council Bluffs to Ogden, and from Kansas City to Boaz), at the then ruling rate for such entire distance fixed by the postmaster-general. The dispatches were paid for either by the sender or the receiver, and have been allowed to him upon the settlement of his account. It is claimed by the government, however, that the circumstances under which the dispatches were delivered for transmission were such as to entitle it to claim that the agency chosen for the service was the railway, and not the telegraph company, and that the former was thus required to transmit them under the terms of its charters.

Prior to July 1, 1888, the Western Union had constructed and was operating continuous telegraph lines on or near the roadbed of the railway company from Council Bluffs to Ogden, and was also operating continuous lines along or upon the roadbed of the railway company from Kansas City to Boaz. Upon July 1, 1881, the defendants undertook to enter into an agreement for the joint operation of all these lines, and of the lines constructed by or then operated by the railway company, and during the time covered by the claim of the complaint, operated the same in accordance with the terms thereof. Inasmuch as this agreement could in no way alter the obligations which the contracting parties owed to the government under the statutes above referred to, it is not necessary to discuss its validity, nor to refer to its terms, save in the following particulars: The persons who were to receive and transmit such messages as might be delivered at the several stations, whether on commercial or on government business, were the employees of the railway company, who thereafter acted as

agents for both the telegraph and the railway company. At each receiving station the same individual received the "telegrams between the several departments of the government and their officers and agents," for the transmission of which only the special rates fixed by the postmaster-general, under the telegraph acts, were to be charged; and also, "the dispatches for the government, whenever required to do so, by the department thereof," which were to be accounted for in the manner prescribed by the railway acts. Each party reserved the exclusive use of not exceeding three wires between Council Bluffs and Ogden, and not exceeding two wires between Kansas City and Denver (which is beyond Boaz). There is nothing to show that under this agreement the railway company disabled itself from fulfilling its obligations under the statutes. It had operators to receive the dispatches it might be required to transmit, and wires by which to transmit them, and could certainly have kept an account of all such. It did not, indeed, keep such account of the dispatches enumerated in the bill of particulars. But if it appears that the government did not, as between the two systems of telegraphic service, in each of which it had reserved special advantages to itself, make choice of the railway; if it never required the transmission of the dispatches in the manner provided in the railway acts—the railway company was under no obligation to keep such account. The statute contemplates some act of selection, something which shall require the railway company to fulfil its obligation. No doubt, a formal requisition by a department of the government is not in each case necessary. The officers and employees of such department may fairly be considered its agents for that purpose, but their acts must go to the extent of indicating that on behalf of the department they claim the fulfilment of such obligation.

The first item on the bill of particulars is a dispatch from Jeffersonville to San Francisco. Neither of these places is on the subsidized line. At neither of them was there any agent of the railway company. The delivery on

the Western Union blank, to a Western Union agent at the former place, of a dispatch, whose nature indicated that it was entitled to special facilities and rates at the hands of the telegraph company, and with no further request than that it should be forwarded to its destination, was in no sense a requirement that at some remote point it should be transferred, for a portion of the route, to another telegraphic system, from which the government was entitled, if it chose, to require a different service upon different terms. It was the duty of the agent receiving it to forward it at once, and, if it were possible, without break, to its destination. If, in its transit, it were taken at some intermediate point by an agent of the telegraph company, who was also, at that point, an agent of the railway company, and operating the wires of both, it would, in the absence of any instructions, have been an unwarranted interference on his part with the government's right of choice, to have undertaken to make the change. It was not for him to determine which of its two subsidized systems was to be employed. He was bound to know that the message which had thus come over the wires of his company was being transmitted at special rates, and had no authority, by transferring it to another system, to alter those rates for any portion of the route. Which of the two systems it was, on the whole, for the best interest of the government to employ, was a matter to be determined by its agents, not by those of the defendants. Nor does it seem reasonable to apply any different rule where the dispatch was delivered at a station on the line of the road where the operator was an agent of both companies. The presentation of the dispatch on a Western Union blank (and also, in the case of prepaid messages, the payment of the special rate), without any direction to use the railway system, was notice to him, which he could not disregard, to give to the message the advantages which accrued from its transmission by the Western Union lines. Verdict directed for defendants.

**THE WESTERN UNION TELEGRAPH COMPANY v. LOUIS
HENDERSON.**

Alabama Supreme Court, Apr. 8, 1890.

(89 Ala. 510.)

DELAY IN DELIVERY OF TELEGRAM.—LIMITING TIME.—UNREPEATED MESSAGE.—DAMAGES.—FREE DELIVERY LIMIT.

A stipulation in a telegraph blank, that claims for damages must be presented in writing within sixty days after the message was presented for transmission, is sufficiently complied with by the commencement of an action within that time.

A regulation fixing a limit beyond which free delivery of telegrams will not be made, is reasonable; and it is the duty of the sender of a message, who is presumed to know whether or not the addressee lives within the free delivery limit, to make arrangements for its delivery. Failing in this, he can have no cause of action against the company for delay in delivery.

The onus of proving that the addressee lives within the free delivery district is upon the sender.

Where mental distress is a natural and proximate result of delay of a telegram, it is a proper element of damages, to enhance those growing out of the breach of contract for prompt delivery, made by the company with the sender.

The stipulation in telegraph blanks as to repetition of messages has no application to a case where the message was transmitted promptly and correctly to the terminal office, and the delay happened after its reception there.

The insufficiency of business at a telegraph office to warrant keeping help enough to conduct the business properly is no excuse for breach of contract for prompt delivery.

Cases of this series cited in opinion: *Grinnell v. W. U. Tel. Co.*, vol. 1, p. 70; *Young v. W. U. Tel. Co.*, vol. 1, p. 187; *W. U. Tel. Co. v. Rains*, vol. 1, p. 697; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 736; *Gulf, & Co. v. J. T. Levy*, vol. 1, p. 543; *Stuart v. W. U. Tel. Co.*, vol. 2 p. 771; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 348; *Simpson v. W. U. Tel. Co.*, vol. 2, p. 819; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *Logan v. W. U. Tel. Co.*, vol. 1, p. 235; *Russell v. W. U. Tel. Co.*, vol. 1, p. 63; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *W. U. Tel. Co. v. Way*, vol. 2, p. 455; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14.

APPEAL from Circuit Court, Mobile county. Action for damages. Appeal by defendant below.

The ninth request to charge the jury, the refusal of which was held to be error, was that a regulation fixing a free delivery limit was reasonable, and if the plaintiff failed to comply with such regulation the company was not bound to deliver the message beyond the limit. Further facts sufficiently appear in the opinion.

Gaylord B. Clark and F. B. Clark, Jr., for appellant.

G. L. & H. T. Smith, contra.

STONE, C. J.: St. Elmo and Grand Bay are two stations on the line of roads operated by the Louisville and Nashville Railroad Company. They are five miles apart, and are small villages. Louis Henderson resided near St. Elmo station, and Dr. Rohmer, his family physician, resided near Grand Bay station. At noon, June 26, 1887, Henderson procured to be dispatched at St. Elmo, to Dr. Rohmer at Grand Bay, a telegraphic message in the following language: "Come, first train, to see my wife. Very low." This message was marked, prepaid, 25 cents. In addition, both the sender and the telegraph operator testified that Henderson inquired what the charge was, and on being informed it was 25 cents, paid it to him. The message, though not repeated, reached the operator at Grand Bay without mistake and without delay.

Dr. Rohmer testified that he received this telegram about 9 o'clock A. M., June 27th, the day after its transmission; that it was handed to him at his residence, but he did not state by whom. He testified, further, that, if he had received the message on the 26th, he would have obeyed it, traveling either by train or by private conveyance. He reached the patient about noon on the 27th, and relieved the intensity of her suffering, but she died about six hours afterwards. He did not know whether, if he had reached her the day before, her life could have been saved. Plaintiff testified

that when the telegram was sent his wife was suffering acutely, and that her suffering increased until the arrival of the doctor, when he alleviated it.

The present action was brought to recover damages for the non-delivery of said telegram within a reasonable time. The defendant interposed five pleas in bar, but at present we purpose to consider only those on which issues of fact were formed. These are pleas 3 and 4. A demurrer was interposed by plaintiff to each of those pleas, 3 and 4, and the demurrers were overruled. There was no error in this.

In the printed caption of all messages sent by the telegraph company, are certain conditions on which the company receives and transmits messages, and no message is received or sent unless it is written on the company's blank preceded by the conditions. The message in this case was written on the company's blank, and was preceded by the printed conditions. One of the conditions is that "the company will not be liable for damages in any case where the claim is not presented, in writing, within sixty days after sending the message." Plea No. 3 set up this condition, and averred that the claim here sued on was not presented to the company within sixty days after sending the message. To this plea plaintiff filed a replication, averring that, in less than sixty days after the message was sent, the present suit was brought, a complaint filed setting forth the claim of damages for non-delivery of the message, and service of a copy of the complaint on the defendant corporation, all within sixty days. To this replication the defendant demurred, and the court overruled its demurrer.

There are decisions which hold that a suit, setting forth the ground of complaint, instituted, and process upon it served, within the sixty days, is not a compliance with this regulation. *Wolf v. W. U. Tel. Co.*, 62 Penn. St. 83; *W. U. Tel. Co. v. McKinney*, 8 Amer. & Eng. Corp. Cas. 123. Such regulation is generally held to be valid and binding. *Grinnell v. N. Y. Tel. Co.*, 113 Mass. 299; *Young v. Same*, 65 N. Y. 163; *W. U. Tel. Co. v. Rains*, 63 Tex.

27; *Fire Ins. Co. v. Felrath*, 77 Ala. 194. Our own rulings on a question not distinguishable from this in principle have been different. *E. T. Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150; *S. & N. R. R. Co. v. Morris*, 65 Ala. 193; *Same v. Bees*, 82 Ala. 340. The Circuit Court did not err in overruling the demurrer to the replication to the defendant's third plea. The averments of that replication being unquestionably true as shown by the record, that line of defense will receive no further consideration.

On the trial of this cause the real controversy, both in fact and law, so far as mere *right* of recovery was concerned, arose on the issue raised by the fourth plea. That plea sets up as a defense to the whole action that the defendant corporation had established a limit within which it undertook to make free delivery of messages sent over its wires, which limit was a half mile, or radius of a half mile, from its office, at places having the population that Grand Bay had; that in the said printed heading, which accompanied and formed part and condition of every written message it received for transmission, including the one received in this case, was and is the following clause: "Messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance, a special charge will be made to cover the cost of such delivery;" and that Dr. Rohmer, to whom said message was sent, did not live within the said free delivery limits of said office. The plea then avers that no consideration was paid or tendered by plaintiff for the delivery beyond the free delivery limits, and no notice was given by the sender, nor did the telegraphic operator know, that Dr. Rohmer was not living within said limits. This plea was followed by much pleading and many rulings of the court. We will not set out the various steps taken, but will declare the rules by which the relative duties of the parties must be determined.

Telegraphy is a quick moving substitute for mail service, which, by contrast, has become tardy. Celerity is its boast, and when rapid communication is desired, its instru-

sage is silent about free delivery. If we held the clause in controversy to be restrictive of a right, then, in the case supposed, the telegraph company would be bound to deliver to the sendee, no matter how great the distance to his residence. Free delivery is a conditional obligation, contingent on the sendee's residence being within the area of free delivery; and until that condition is shown, the telegraph company is not put in default. The *onus* of proving that Dr. Rohmer's residence was within a half-mile was on the plaintiff. 3 Brick. Dig. 433.

Whether, in such a suit as this, damages can be recovered for mental anxiety or mental distress caused by the non-delivery of the message, through the negligence of the telegraph company, is a question upon which the authorities are in palpable conflict. They are not alone in conflict—they are widely variant. Some rulings reject such evidence in all cases which are based on breach of contract. Others reject it when there is no element of recovery other than mental suffering, but receive it in aggravation, when there is another independent cause of action. On this last principle, a distinction is taken, in some cases, between suits in which the sender is plaintiff and those in which the sendee complains. In the one case, the suit is by a party to the contract, who can maintain an action for its breach, even though he may be able to recover only nominal damages. In the other there is no privity of contract, and there can be no recovery except for actual damages proved. There is, therefore, in this case, if the rule be sound, an independent right of recovery, to which distress of feeling becomes an aggravating incident. There are still other authorities which hold that such evidence is admissible on general principles, and as an independent ground of recovery. We cite many authorities, but will not attempt to reconcile them. Nor will we comment on them further. *Wadsworth's Case*, 6 S. W. Rep. 364, and 8 S. W. Rep. 574; *Tenn. R. R. Co. v. Levy*, 59 Tex. Rep. 542; *Same v. Same*, ib. 563; *Stuart's Case*, 66 Tex. 580; *So Relle's Case*, 55 Tex. 308; *Hays v. R. R. Co.*, 46

Tex. 272; *Simpson's Case*, 11 S. W. Rep. 385; *West's Case*, 7 Amer. St. Rep. 534, 335, note; Shear. & Redf. Neg., § 756; 5 Amer. & Eng. Encyc., 42, note; *Logan's Case*, 84 Ill. 468; *Turnpike Co. v. Boone*, 45 Md. 344; *Walsh v. Railway Co.*, 42 Wis. 23; *West's Case*, 39 Kan. 93; *Russell's Case*, 3 Dak. 315. The case of *W. U. Tel. Co. v. Cooper*, 9 S. W. Rep. 598, is a very peculiar one.

As to the element of mental anguish claimed to have been suffered by the plaintiff, we think it the proximate consequence of the failure to deliver the message, and that the perusal of the message would naturally suggest such consequence as likely to ensue from the non-delivery. The right of the plaintiff to sue for the breach of the contract to deliver, if within the free delivery distance, takes this case out of the rule, if a sound one, that mental distress will not maintain the suit when there is no other element of recoverable damage. We find no error in the rulings as to the proper elements of damage, and we agree with the Circuit Court in holding that there was no proof which authorized exemplary or vindictive damages.

In the light of the principles declared above, some portions of the general charge which we have not referred to specially, and the charge given at the instance of the plaintiff, are subject to criticism; but we deem it unnecessary to comment further upon them. What we have said will furnish the proper correction. The ninth charge asked by defendant ought to have been given.

The message, for the failure to deliver which the present suit was brought, was not a repeated message. Pleas were interposed, and charges were asked based on stipulations in regard to non-repeated messages, as set forth in the printed caption attached to the form or blank on which the message was written. The message, though not repeated, was correctly, and without delay, transmitted to the terminal office, and was there understood and copied accurately. This answered all ends repeating could have accomplished, and leaves that clause without practical

Telegraph Co. v. Henderson.

operation in this case. None of the provisions intended to be restrictive of liability on non-repeated messages, and none of the stipulations for exemption from the consequences of negligence, have any proper consideration in the determination of this case. *W. U. Tel. Co. v. Way*, 83 Ala. 542; *White's Case*, 14 Fed. Rep. 710; *Tyler's Case*, 74 Ill. 168; 3 Suth. on Dam. 296, 297. The demurrers to pleas 2 and 5 were properly sustained, and all charges seeking to raise the question presented in those pleas were properly refused.

The attempt was made in the trial court to excuse the telegraph company from liability for non-delivery of the message on the ground that the business and emoluments of the office at Grand Bay were insufficient to justify the employment of a separate telegraphic operator, or a messenger boy to deliver messages. *Behm's Case*, 8 Cent. Law Journal, 445, is relied on to support this position. This may furnish a very good reason for withholding telegraphic service, or, perhaps, for different regulations in regard to delivery at places thus circumstanced. It affords no excuse for violating the terms of a contract. We cannot follow *Behm's Case*.

The defendant offered to prove in defense that it was not the custom of Dr. Rohmer to make professional calls at a distance without prepayment, or guaranteed payment, of his charges. This testimony, on objection, was ruled out. There was no error in this. If the doctor lived within the area of free delivery, it was not for the telegraphic operator to speculate on the chances that the summons would or would not be obeyed. If it had been shown that Dr. Rohmer would not have obeyed if he had received it, this, it would seem, would have proved that the plaintiff suffered no real injury from the failure to deliver the message. So far from this being proved, Dr. Rohmer testified that if he had received the message, he would have obeyed the call.

The natural utterances and expressions indicative of pleasure, displeasure, pain or suffering are competent, original evidence, that may be received in proof of the phy-

sical or mental state they indicate, whenever that state is a pertinent inquiry. Wood Prac. Ev. § 147.

Two parts of the testimony received at the instance of plaintiff should have been rejected: First, the answer of the operator at Grand Bay, made on 27th, in reply to plaintiff's inquiry, why the message had not been delivered; and, second, that the Western Union Telegraph Company was a wealthy corporation.

We have now noticed every material question raised by the record.

Reversed and remanded.

NOTE.—See INDEX to this and to previous volumes, titles "Limiting time," "Limiting liability," "Damages," "Notes" (for notes on said subjects).

For references to earlier Alabama cases upon the duties and liabilities of telegraph companies, see note to *W. U. Tel. Co. v. Wilson*, *post*.

This case is cited in *Brashears v. W. U. Tel. Co.*; *Crawson v. W. U. Tel. Co.*; *Kennon v. W. U. Tel. Co.*; *W. U. Tel. Co. v. Wilson*; *W. U. Tel. Co. v. Lowrey*—*post*.

THE AMERICAN UNION TELEGRAPH COMPANY v. H. L. DAUGHTERY.

Alabama Supreme Court, April 15, 1890.

(89 Ala. 191.)

DELAY OF TELEGRAM.—LIMITING LIABILITY.—CIPHER DISPATCH.—DAMAGES.—EVIDENCE.

A stipulation in a telegraph blank limiting the liability of the company upon unrepeatd messages is void as to cases where the negligence of the company is the cause of the damage.

Though a message is in cipher, and its contents and importance are not communicated to the operator, the company is still liable for the natural and proximate damages caused by the fault or neglect of its agents.

There being no evidence of wilful or gross negligence, the company is liable only for actual damages sustained.

Telegraph Co. v. Daughtery.

The question of contractual relations of sender and addressee is immaterial upon the point of the liability of the company.

Foundation for admitting secondary evidence of the contents of a telegram, held not sufficiently laid in a given case.

Cases of this series cited in opinion: *Daughtery v. Am. Un. Tel. Co.*, vol. 1, p. 588; *W. U. Tel. Co. v. Way*, vol. 2, p. 455.

APPEAL from Circuit Court, Lee county.

Action for damages for delay of a cipher dispatch sent for the plaintiff by Renfro Bros., his brokers, at Opelika, Ala., to Lehman Bros., his brokers, at New York, directing them to sell cotton.

Instead of producing the telegram upon the trial, the plaintiff offered as a witness one Purnell, the manager in charge of the Western Union Telegraph Company at Opelika, who testified that that company succeeded to the business of the defendant in October, 1881 (the telegram in question was sent in January, 1881); that he had been in charge of the office at Opelika ever since; that all the papers on file there when he took charge of the office were sent by him to Mobile, from which place, as he afterwards learned, they were shipped to New York, and there sold to a paper mill and ground into pulp; that he had never seen the telegram in question, and did not know that it was among the papers so sent off and destroyed.

Further facts sufficiently appear in the opinion.

Jones & Falkner, A. & R. B. Barnes and Gaylord B. Clark, for appellant.

John M. Chilton, contra.

CLOPTON, J.: * * * * *

As in cases of other writings, proof of the loss of a telegram is a prerequisite to the admission of secondary evidence of its contents. *Whilden v. Mer. & Plant. Bank*, 64 Ala. 1. Ordinarily the declarations of the person who last had possession of a writing are not receivable as evidence of its loss, if he be alive and in the jurisdiction of

the court. There are cases in which the declarations of a person to whom it was last traced, to the effect that he did not have the instrument, or to whom he had delivered it, have been received for the purpose of showing that the party had prosecuted a diligent search. *Reg. v. Kenilworth*, 53 Eng. Com. Law Rep. 641. Though, as the sufficiency of the preliminary proof is for the court, it may not be necessary to preserve the strict rule between direct and hearsay evidence, it is not so far relaxed as to admit hearsay evidence to show the fact of search, or the destruction of the writing by the declarant. 1 Wharton on Ev. sec. 150. It was not competent to allow the witness, Purnell, to testify, from information received from others, that the papers of defendant had been sent from Mobile to New York and sold to a paper mill. * * *

The second plea of defendant sets up that by the contract for the transmission of the message, defendant was not to be liable for damages from any failure to transmit or deliver, or from any error in the transmission or delivery, of an unrepeatable message, and, to guard against errors, would repeat any telegram for extra payment, or one-half the regular rate; and in such case not to be held liable for damages beyond fifty times the amount received for sending and repeating the telegram, and that the telegram in question was not repeated. In *West. Un. Tel. Co. v. Way*, 83 Ala. 542, we held that a telegraph company cannot contract to be absolved from due care and diligence in the transmission and delivery of telegrams to a point of destination on its own line, or for exemption from liability for the negligence of its own agents; and that terms and conditions similar to those set up in the plea are limited to cases where the negligence of the company is not the cause of delay or non-delivery. The plea is defective, in failing to aver facts which bring the case within the scope of exemption.

On the former appeal in this case, the several grounds of demurrer to the complaint, now presented for consideration, except two interposed after the case was remanded,

were fully considered, and held not to be well taken. The same question relating to the liability of the telegraph company for failure to transmit and deliver in due time a message in cipher, which was not explained to the operator, then presented by demurrer alone, is now raised by both demurrer and charges. The court held, when the case was formerly before us, that, though the message was in cipher, and its contents or importance were not communicated to the operator, if the company received and agreed to transmit and deliver it, and failed to do so in consequence of the fault or neglect of its agents, it is liable for the damages naturally and proximately resulting therefrom; but not for damages arising from special, collateral circumstances not communicated, and in reference to which the parties are not presumed to have contracted. *Daughtery v. Amer. Un. Tel. Co.*, 75 Ala. 168. This question was subsequently reconsidered in *Western Un. Tel. Co. v. Way*, *supra*, and the rule declared in the former case reaffirmed. We see no reason for departure from the ruling.

But it is insisted that defendant's prior purchase of three hundred bales of cotton, two hundred to be delivered in May and one hundred in June, 1881, are special circumstances not communicated. The telegram, as translated, is: "Sell on account of Daughtery, to cover, 100 June, 200 May." This was a direction to cover the previous contracts of purchase of cotton to be delivered in the same months, and was equivalent to a direction to sell the cotton previously purchased. It was so construed on the former appeal, and ruled that the natural and proximate damages were the depreciation in the market price of cotton, between the times of the direction to sell, and the actual sale, a few days thereafter. All the rulings of the courts, with respect to the measure of damages, are in accord with these principles, except the refusal to give the charge requested by the defendant, to the effect that plaintiff is not entitled to recover any amount except the price of the telegram, and such damages as naturally arose from a breach of the contract. The refusal to give this charge can be justified only on

the ground that the case warranted the jury in allowing exemplary damages. There is no evidence of wanton or wilful negligence, or negligence so gross as to evince an entire want of care. Not being a case for the allowance of exemplary damages, plaintiff is entitled to recover only the actual damages sustained.

It is shown that Renfro Bros. were the brokers of Daughtery, and that Lehman Bros., to whom the telegram was addressed, were their correspondents, and members of the Cotton Exchange in New York. Whether Lehman Bros. were the brokers of Daughtery, or whether there were any contractual relation between them, is immaterial. The liability of the defendant is not affected by the character of their relations, or by the want of contractual relations. The several charges in reference to this question were abstract and properly refused.

The other assignments of error have not been pressed in argument, and it is unnecessary to consider them.

Reversed and remanded.

SOMERVILLE, J., dissenting: I dissent from so much of the opinion of a majority of the court in this case as relates to the damages recoverable for the failure to transmit and deliver cipher telegrams. I think the sound rule is to limit the measure of damages in these cases to such as are nominal, or, at most, the price paid for sending the message. The reason and authorities in support of this conclusion are fully discussed in my dissenting opinion in *The Western Union Tel. Co. v. Way*, 83 Ala. 562-565.

NOTE.—See INDEX to this and to previous volumes, titles "Limiting liability," "Damages." See notes, vol. 1, p. 444, 108; vol. 2, p. 463. See note to *W. U. Tel. Co. v. Wilson*, *post*.

KENNON & BROTHER v. WESTERN UNION TELEGRAPH COMPANY.*Alabama Supreme Court, April 16, 1891.*

(92 Ala. 399.)

ERROR IN TELEGRAM.—RIGHTS OF ADDRESSEE.—PLEADING.

In an action by the addressee of a telegram, against the company, for error and delay in transmission of the message, if the complaint alleges that the sender was the agent of the plaintiff, and was repaid by the latter the amount paid by him for transmission; that the company contracted to send the message promptly, and negligently delayed it several days; it is not demurrable. For the plaintiff would not only be entitled to recover at least the amount paid by him for transmission, but independent of that he could recover nominal damages.

Cases of this series cited in opinion: *Gulf, &c. Railway Co. v. I. Levy*, vol. 1, p. 536; *Harkness v. W. U. Tel. Co.*, vol. 2, p. 571; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *Daughtery v. Am. Un. Tel. Co.*, vol. 1, p. 588; *W. U. Tel. Co. v. Way*, vol. 2, p. 455; *W. U. Tel. Co. v. Henderson*, vol. 8, p. 570.

APPEAL from Circuit Court, Lee county. Appeal from judgment sustaining demurrer to complaint.

The facts material to the decision are stated or sufficiently indicated in the opinion.

J. M. Chilton and *W. J. Samford*, for appellant.

Gaylord B. Clark, contra.

McCLELLAN, J.: As we construe the amended counts of the complaint, they each sufficiently aver that the plaintiffs, through their agents in New York, made a contract with the defendant to transmit a message from the agents to their principals at Salem, Alabama, with diligence and dispatch, for a reward then and there paid by the agents for the principals and subsequently repaid by the latter to the former; and that the defendant violated said contract, in that it missent the message and failed to transmit and

deliver it to plaintiffs for several days after it received the same for transmission, and should have transmitted and delivered it. On the contract thus alleged, these plaintiffs may sue, and, if the evidence develops that they were disclosed to the telegraph company as the principals in the contract, they may recover against the defendant. *G. C. & S. F. Rwy. Co. v. Levy*, 43 Am. Rep. 278; *Harkness v. W. U. Tel. Co.*, 5 Am. St. 672; *West v. W. U. Tel. Co.*, 7 Am. St. 520; *W. U. Tel. Co. v. Broesche*, 13 Am. St. 843; *Daughtery v. A. U. Tel. Co.*, 75 Ala. 168.

The breach alleged entitles the plaintiffs to recover at least the reward paid by or for them for the transmission of the message, and eliminating this element, they would still be entitled to recover nominal damages. *W. U. Tel. Co. v. Way*, 83 Ala. 542, 562, 563; *W. U. Tel. Co. v. Henderson*, 89 Ala. 510, 518; *Daughtery v. A. U. Tel. Co.*, 75 Ala. 168, 171.

It follows that, whether the plaintiffs were entitled to recover the damages alleged to have resulted to them from the decline in the price of cotton between the time the dispatch should have been delivered to them and the time at which they ordered the sale of 1,000 bales, the averment being that the order would have been given upon the instant of receiving the message, and was delayed three days in consequence of its non-receipt, or not, the demurrers to the amended complaint should have been overruled. Not only do those demurrers fail, as matter of law, to answer the whole complaint, so as to raise any question as to the right thereunder to recover nominal damages and the price of the message, except in so far as to assert what we have determined to be the untenable proposition that the action proceeds in the names of the wrong parties, but they are confessedly addressed only "to so much of each of said counts, respectively, as seeks a recovery beyond the price of the telegram." Causes cannot be determined by piecemeal on demurrer. The pleader must answer the whole complaint, and for all purposes, when he resorts to this mode of defense. When the cause of action

in the complaint, is signed by Renfro Bros., the senders. But the message is not the contract declared on. The complaint avers in substance, that the plaintiff made the contract through his agents, Renfro Bros. The contract declared on, we suppose, was oral. It is not averred that it is in writing. If in delivering and paying for the message to be forwarded, Renfro Bros. disclosed the name of their principal for whom they were acting, that constituted it plaintiff's contract, upon which he can sue in his own name. Such proof is admissible under the complaint as framed, and if made, will sustain the averment." On a like state of averment, this principle was reaffirmed in the case of *W. P. Kennon & Bro. v. W. U. Tel. Co.*, at the present term, the action being in the name of the persons to whom the message was sent by their agents under an agreement for transmission made between them and the telegraph company, in which it was said: "On the contract thus alleged, these plaintiffs may sue; and, if the evidence develops that they were disclosed to the telegraph company as the principals in the contract, they may recover against the defendant." In such cases the plaintiff, upon making the requisite proof as to the fact of the agency of the senders, and the disclosure of that fact to the defendant at the time of contract made, would be entitled to recover at least nominal damages for the breach of the contract thus existing between him and the defendant, and in addition thereto, damages for mental anguish and suffering occasioned by the defendant's failure to comply with its undertaking in respect of prompt transmission and delivery. *W. U. Tel. Co. v. Henderson*, 89 Ala. 510.

But the law appears to be well settled that in the absence of the element of damages resting on a breach of contract in force at the time between the parties, and in the absence of any actual injury to the person, reputation or estate of the plaintiff, there can be no recovery for injury to the feelings; or in other words, that an action can not be maintained solely for mental sufferings, though, if other ground of damage, either nominal or substantial, be averred

and proved, such averment and proof constitute an essential predicate for the imposition of damages for lacerated feelings by way only of aggravation of actual damages. *W. U. Tel. Co. v. Levy*, 59 Tex. 563; S. C. 46 Am. Rep. 278; *Johnson v. Wells, Fargo & Co.*, 3 Am. Rep. 245; *Wyman v. Leavitt*, 71 Me. 227; *West v. W. U. Tel. Co.*, 39 Kan. 93; *Canning v. Williamstown*, 1 Cush. (Mass.) 451.

In the case at bar, one of the questions presented by the demurrer is, whether the complaint alleges a contract between the plaintiff and the defendant, for the breach of which at least nominal damages are recoverable, so as to make such right of recovery the basis for the imposition of further damages for mental distress, which are claimed. We think such contract is laid in the complaint, not by direct averment, it is true, but by the averment of facts from which the law implies a contract, and upon proof of which the existence of the contract would be declared. It is alleged that the defendant "was engaged in the business of transmitting messages for hire by means of electricity, from Howard, in the State of Georgia, to Childersburg, in the State of Alabama, and was then and there a public telegraph company; and, being so engaged, W. J. Wilson did, for the benefit, and as the agent of plaintiff, deliver to defendant, at its office in Howard, the following message, viz.:

"HOWARD, Ga., April 27, '90.

To W. L. Wilson, Childersburg, Ala.: Father died this P. M. Come at once.

[Signed],

W. J. WILSON."

for transmission to plaintiff by telegraph at Childersburg, and plaintiff's said agent did then and there pay defendant the sum of 40 cents, the price of transmitting and delivering said message; said W. J. Wilson was the brother of plaintiff, and the person mentioned in said message as 'father' was the father of both W. L. and W. J. Wilson; and said defendant was well aware of all such relationship." It is not in terms alleged that the defendant received and undertook to transmit and deliver this message, but both

these facts sufficiently appear from the allegations that defendant did transmit the dispatch promptly to his office at Childersburg, and there delivered it to W. L. Wilson, the plaintiff, though not until after the lapse of a day from the time at which it should have been delivered. These averments import an acceptance of the message by the defendant necessary to a complete contract for its being sent to Childersburg, and there promptly delivered to the plaintiff, even within the strict rule laid down in *Somerville v. Merrill*, 1 Port. 107, relied on by the appellant's counsel; and the complaint, taken as a whole, adequately states a contract entered into between the plaintiff, through his agent, and the defendant, for the failure of the defendant to comply with which, alleged in the complaint, plaintiff was entitled to recover at least nominal damages, and such damages for distress of mind resulting from the delay of delivery, whereby he was prevented seeing the body of his father and being present at his funeral, as from the terms of the message must have been in the contemplation of the parties. The demurrers, which proceeded on the theory that the plaintiff was without right to sue for a breach of this contract, and that damages for mental suffering were not recoverable in this action, were properly overruled. Authorities *supra*; *W. U. Tel. Co. v. Brown*, 10 S. W. Rep., 323; *Beasley v. W. U. Tel. Co.*, 39 Fed. Rep. 181; (7 Am. St. 530, and notes); *Harkness v. W. U. Tel. Co.*, 5 Am. St. 672; *Stuart v. W. U. Tel. Co.*, 66 Tex. 850; S. C. 59 Am. Rep. 623.

There is no merit in the objection that the complaint does not allege that the message was in writing. We need not describe whether it would be the duty of defendant company to receive for transmission a verbal message — doubtless a rule on its part to the contrary would be a reasonable one — nor whether the complaint does in effect allege this message to have been in writing, though its averments might well be construed to import that the message, as delivered by plaintiff's agent, was a written one. These considerations are rendered immaterial by the averments

of the complaint that the message, whether verbal or written, and whether or not there was any duty to receive it as offered resting on the defendant, was received and correctly transmitted to its office at the point of destination; and it can not now be heard to excuse itself for unreasonable delay in delivering it from that office on the ground that it was under no obligation to receive it in the first instance.

The objection taken by the demurrer that the complaint shows the contract for transmission and delivery of the telegram to have been made on Sunday, and is therefore void, is untenable. We can not doubt but that the emergency of the death and burial of one's father involves such moral necessity for his presence before and at the funeral as brings any contract, made to that end on Sunday, within the exception of cases of necessity made by our statute, if indeed such contracts would not also be within the exception in favor of works of charity, in a liberal sense of that term. *Burns v. Moore*, 76 Ala. 339; *G. C. & F. S. Railway Co. v. Levy*, 59 Tex. 542; S. C., 46 Am. Rep. 269; *Doyle v. L. & B. R. R. Co.*, 118 Mass. 195.

The foregoing considerations dispose of the objections taken to the trial court's rulings on the demurrers interposed by the defendant below, which alone are presented for review on this appeal.

Those rulings are free from error, and the judgment is affirmed.

NOTE.—See INDEX to this and to prior volumes, titles "Sunday Contract," "Receiver or Addressee," "Damages," also "Notes" on said subjects.

For reference to earlier Alabama cases, see note, vol. 2, page 470.

THE WESTERN UNION TELEGRAPH COMPANY v. C. T.
SHORT.

Arkansas Supreme Court, Oct. 18, 1890.

(58 Ark. 484.)

ERROR IN TELEGRAM.—LIMITING LIABILITY.—DAMAGES.

A stipulation in a telegraph blank, limiting the liability of the company for damages caused by error, delay, &c., in the transmission of unrepeatd messages, "whether happening by negligence of its servants or otherwise," is contrary to public policy, and void.

Failure of a telegraph company to transmit and deliver a message in the form or language in which it was received is *prima facie* evidence of negligence, for which the company is liable.

A telegram as presented for transmission read, "Seaton's case is set for August seventeenth; "as delivered it read "seventh;" by reason of which the addressee, plaintiff, was led to make a useless trip to attend the trial of an action in which he was a witness. Held, that he could recover the value of his time and his reasonable expenses, but not the amount lost by reason of special circumstances, not indicated by the telegram and of which it did not appear that the company had notice.

Cases of this series cited in opinion: *L. R. & F. S. Tel. Co. v. [Davis]*, vol. 2, p. 875; *Fowler v. W. U. Tel. Co.*, vol. 2, p. 607; *Smith v. W. U. Tel. Co.*, vol. 1, p. 748; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404; *Harkness v. W. U. Tel. Co.*, vol. 2, p. 571; *Bartlett v. W. U. Tel. Co.*, vol. 1, p. 45; *W. U. Tel. Co. v. Meredith*, vol. 1, p. 648; *W. U. Tel. Co. v. Tyler*, vol. 1, p. 115; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99; *Thompson v. W. U. Tel. Co.*, vol. 1, p. 772; *W. U. Tel. Co. v. Crall*, vol. 2, p. 575; *Tel. Co. v. Griswold*, vol. 1, p. 329; *De La Grange v. S. W. Tel. Co.*, vol. 1, p. 59; *W. U. Tel. Co. v. Fontaine*, vol. 1, p. 229; *First Nat. Bk. v. W. U. Tel. Co.*, vol. 1, p. 221.

APPEAL from Circuit Court, Hempstead county.

Facts stated in opinion.

U. M. & G. B. Rose and *Smoot & McRae*, for appellant.

R. B. Williams, for appellee.

BATTLE, J.: On the 24th day of July, 1886, the Western Union Telegraph Company was engaged in the business of operating a telegraphic line between Bonham, Tex., and Hope, Ark. Prior to that day, C. T. Short was recognized to appear as a witness in a case pending in court at Bonham, and known as Seaton's case. Desiring to be present when called as a witness, he wrote to Lusk & Thurman, attorneys at Bonham, to notify him of the day upon which the case was set for trial. Not hearing from them by mail, he requested them to notify him by telegram. On the 24th of July, 1886, Lusk & Thurman delivered at Bonham, to the Western Union Telegraph Company, a message notifying him that the case was set for August 17th. It was delivered written upon one of the printed forms of the Western Union Telegraph Company. A portion of the form and the message as it was written in the form are as follows :

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for the non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. * * *

"Send the following message, subject to the above terms, which are hereby agreed to :

"BONHAM, Texas, July 24, 1886.

"To C. T. Short, Nashville, Ark.:

"Seaton's case is set for Saturday, August the seventeenth.

"LUK & THURMAN."

The telegram as delivered was intended to notify Short,

and so specified upon its face as delivered to the company at Bonham, that Seaton's case was set for the 17th of August. A telegram was transmitted and delivered to Short by the company at Nashville, Ark., upon a form the same as that upon which the message was written. The message received differed from the one delivered at Bonham in this: The one received by Short specified the 7th of August as the day upon which Seaton's case was set for trial, and the one delivered to the company specified the 17th of August. Short did not have the telegram repeated; but acting upon it as he received it, went to Bonham, in obedience, as he supposed, to his recognizance, and reached there on the 6th of August, and found that Seaton's case had in fact been set for the 17th of August, is specified in the message delivered to the company by Lusk & Thurman.

Short sued the Western Union Telegraph Company for \$422.35, the amount of the damages he alleged he suffered on account of the failure of the defendant to send the message as it was delivered to it. In the course of the trial of his action, an agreed statement of the foregoing facts was read in evidence, and he testified over the objections of the defendant as follows: "It took me six days to go to Bonham and return. At this time (when the message was received) I was running a saw mill near Nashville, Ark., and superintending the business of the mill. In going to Texas as a witness in response to said telegram as delivered to me, it became necessary for me to stop my mill operations, as there was no one else to manage it for me. The value of my time during the six days that I was absent was fifty dollars. My railroad fare to Bonham, Tex., and return, was \$13.35. My hotel bills on this trip were \$9. And during that time my teams for hauling stock and lumber were idle, and their services, if I had been at home, would have been worth \$75, and it cost me during that time \$25 to feed them, and I lost the services of a valuable man, by which I was damaged in the sum of fifty dollars (\$50). At that time my mill was cutting upon an average 15,000 feet of

lumber per day, at a cost of \$4.75 per thousand, which I was selling at \$8.50 per thousand, and had more orders and contracts to furnish lumber than I could fill, and by reason of the stoppage of my mill during the six days of my absence, as above stated, I lost the profits I would have made in cutting lumber during that time, which I estimate at the sum of two hundred dollars."

The result of the trial was a verdict and judgment in favor of the plaintiff against the defendant for the sum of \$422.35. The defendant saved exceptions, and appealed.

The court below held that the stipulations in the printed form upon which the message in question was delivered, as to the liability of the appellant for mistakes or delays in the transmission or delivery, or for the non-delivery, of unrepeatd messages, was contrary to public policy, and void, and so instructed the jury. Was this error?

Common carriers of goods and telegraph companies are not subject to the same rule of responsibility. The common carrier is held to the strictest accountability for the safe transportation and delivery of property entrusted to him for safe carriage. In the absence of a contract or regulation limiting his liability, he is treated as an insurer against all losses not caused by the act of God or the public enemy. On the other hand, in the absence of a contract or regulation fixing the liability of telegraph companies, they are not held responsible as insurers of absolute safety and accuracy in the transmission of messages as against all contingencies, but, holding themselves out to the public ready to transmit all messages delivered to them, they are bound to furnish suitable instruments and competent servants, and to use ordinary care and diligence in transmitting messages; and for any failure to use such care and diligence they are responsible to those sustaining loss or damage thereby. They are, however, not liable for the want of any skill or knowledge not reasonably attainable in the present state of telegraphy, "nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency, from whatever source, which the degree of

skill and care spoken of is insufficient to guard against or avoid." *Little Rock & Fort Smith Telegraph Co. v. Davis*, 41 Ark. 79; *Fowler v. Western Union Telegraph Co.*, 80 Me. 381; S. C., 6 Am. State Rep. 211; Shearman and Redfield on Negligence (4th ed.), secs. 537, 539, and cases cited.

Telegraph companies are public agents, and exercise a public employment. They are chartered for public purposes, and are vested with the power of eminent domain, which they cannot lawfully exercise if they are not public agents. By virtue of their public employment, it is their duty, for a reasonable consideration, to receive and transmit all messages over their wires with that integrity, skill and diligence which appertain to their business. "They are a commercial necessity. Business can be transacted without them only at a great disadvantage. In most places there is no choice as to lines, and, where there is, it is so limited that a virtual monopoly exists. On the other hand, the occasion for sending a message often comes suddenly, or with so short a notice," as to compel the sending of the message without delay, or the sufferance of pecuniary loss by the failure to do so. Often the customer cannot afford to wait, and must submit to the terms of the telegraph company. They do not stand upon an equality.

The public is compelled to accept the services of the telegraph company, and to rely upon its discharging its duty. In this and other respects the employments of the telegraph company and the common carrier of goods are strongly analogous. The business in which each is engaged is almost equally important to the public. Vast interests are committed to each, and good faith and diligence in the discharge of the duties of each are essential to the interest of the public. In both cases the demands of a sound public policy alike forbid any stipulations to relieve them of the duty to use the care and diligence resting upon them. To hold otherwise would be to give license and immunity to carelessness and negligence on the part of each, and would be disastrous to the interests of the public. *Smith v.*

Western Union Telegraph Co., 8 Am. & Eng. C. C. 15; *W. U. Tel. Co. v. Blanchard et al.*, 68 Ga. 299; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433; *Harkness v. W. U. Tel. Co.*, 73 Iowa, 190; *Bartlett v. W. U. Tel. Co.*, 62 Me. 209; *Express Co. v. Caldwell*, 21 Wall. 269; *W. U. Tel. Co. v. Meredith*, 95 Ind. 93; *W. U. Tel. Co. v. Tyler*, 74 Ill. 168; *Tyler et al. v. W. U. Tel. Co.*, 60 Ill. 421; *Candee v. W. U. Tel. Co.*, 34 Wis. 471; *Thompson v. W. U. Tel. Co.*, 64 Wis. 531; Gray on Communications by Telegraph, secs. 46-52; 2 Redfield on Railways (6th ed.), p. 342, sec. 12; p. 345, sec. 16; p. 346, sec. 17; 2 Shearman & Redfield on Negligence (4th ed.), sec. 553; 8 Am. & Eng. C. C., p. 44, note and cases cited; 14 Fed Rep. 720, and cases cited; 2 Thompson on Negligence, p. 841, sec. 6, p. 843.

In this case the agreement between the sender of the message and the company was that the company should not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of the message sent, unless it was repeated, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same. By this stipulation the company clearly undertakes to relieve itself of all liability for negligence, the message not having been repeated, and it is contrary to public policy, and void. It is true that many authorities have held that such an agreement is "binding upon all who assent to it, so as to exempt the company from liability, beyond the amount stipulated, for any cause except for wilful misconduct or gross negligence on the part of the company." One of the reasons assigned by these authorities for so holding is "the risks and uncertainties attendant on the transmission of messages by means of electricity, and the difficulties in the way of guarding against errors and delays in the performance of such a service, and the very expensive liability to damages which may be incurred by a failure to deliver a message accurately." But it seems to us that this is not a sufficient reason why such stipulations should be sustained. The telegraph company is only bound to use ordinary care and

diligence in transmitting messages, and is not responsible for any errors or failures which such care and diligence are insufficient to guard against or avoid.

The same authorities further hold that the regulation or agreement that the message must be repeated in order to hold the company liable for negligence beyond the amount received for sending the message is a reasonable precaution taken by the company, and binding on all who assent to it. They say : "The repetition of a message may be unimportant. A mistake in its transmission might occasion no serious damage or inconvenience to the parties interested. Whether it would do so or not would be within the knowledge of the sender or receiver, rather than within that of the operator who transmitted it. The latter could rarely be expected to know what would be the consequences of an error in its transmission. It is therefore a most reasonable requisition that it should be left to those who know the occasion, and the subject of the message, and who can best judge of the consequences attendant upon any mistake in sending it, to determine whether it is of a nature to render a repetition necessary to ascertain its accuracy instead of throwing this burden on the owner or conductor of the telegraph, who cannot be supposed to know the effect of a mistake, or the consequences in damages of a failure to transmit it correctly." This may be true. But, we think, the failure to repeat should not relieve the company of the duty to use due care and diligence in transmitting the message without repetition, and of liability for losses incurred by reason of the failure to do so. The fact that the company could not, from an inspection of the message, know its importance, and foresee the consequences of a failure to send it correctly, or had no notice of the special circumstances under which it was sent, is a matter that ought to affect only the amount of damages for which the company should be held liable.

The court below, in effect, held and instructed the jury that the failure to transmit and deliver the message in the form or language in which it was received was *prima facie*

evidence of negligence, for which the company is liable. It is urged that this was error. But we do not think so. If the failure was not the result of negligence, the means of showing that fact is, almost invariably in all cases, within the exclusive possession of the company. To require the sender to prove negligence, after showing the mistake "would be to require in many cases an impossibility, not infrequently resulting in enabling the company to evade a just liability." *W. U. Tel. Co. v. Crall*, 5 Am. St. Rep., 795; S. C., 38 Kan. 679; *Bartlett v. W. U. Tel. Co.*, 62 Me. 209; S. C. 16 Am. Rep. 437; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; S. C. 41 Am. Rep., 500; *Candee v. W. U. Tel. Co.*, 34 Wis. 471; *Tyler v. W. U. Tel. Co.*, 60 Ill. 421; *W. U. Tel. Co. v. Carew*, 15 Mich. 533; *W. U. Tel. Co. v. Tyler*, 74 Ill., 168; *Olympe De La Grange v. S. W. Tel. Co.*, 25 La. Ann. 383; *W. U. Tel. Co. v. Fontaine*, 58 Ga. 433; *W. U. Tel. Co. v. Blanchard et al.*, 68 Ga. 308; Shearman & Redfield on Negligence (4th ed.) 542, 556; 2 Thompson on Negligence, p. 841, sec. 6, and p. 843; Gray on Communications by Telegraph, 53, 54.

The court below erred as to the measure of damages in this case. The general rule is, damages recoverable for breach of contract "are only those which are incidental to and directly caused by the breach, and may reasonably be presumed to have entered into the contemplation of the parties, and not speculative profits, or accidental or consequential losses." In *Hadley v. Baxendale*, 9 Exch. 354, the rule is correctly laid down as follows: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of a breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the

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plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow, from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." *Leonard v. The New York Tel. Co.*, 41 N. Y. 544; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; *First National Bank of Barnesville v. Telegraph Co.*, 30 Ohio St. 555; *Railway Co. v. Mudford*, 48 Ark. 502, S. C. 27 Am. Rep. 485; 3 Sutherland on Damages, 298-307, and cases cited; Gray on Communications by Telegraph, secs. 82-96, and authorities cited.

In this case, the message indicated that a certain case pending in a court at Bonham was set for hearing or trial on a certain day. The fact that it was sent by telegraph was sufficient to indicate that it was important that Short should know at once the fact intended to be communicated by it. There was enough in it to indicate that Short would probably be induced thereby to go to Bonham to attend the trial of the Seaton case on the day specified therein. This was enough to entitle Short to recover damages. Gray on Communications by Telegraph, sec. 96, and authorities cited. The damages recoverable, according to the evidence, were recoverable expenses incurred by Short in going to Bonham and returning, and the value of his time lost in so doing.

There was no evidence that the telegraph company had notice of any special circumstances connected with the sending of the message. The message contained all the information the company had. All the evidence about the stopping of a mill, idleness of teams, value of their services, and cost of feeding them, the loss of the services of a valu

able man, and loss sustained by reason of the stoppage of the mill, was clearly inadmissible.

The loss sustained on account of expenses of a trip to Bonham and return was \$22.50, and the value of the time lost in the making it was \$50, making his damage recoverable according to the evidence, \$72.35. The verdict should have been for that amount.

If appellee shall enter a remittitur here of \$350, the difference between \$422.35 and \$72.35, within the next fifteen days, according to the rules of this court, the judgment of the court below will be affirmed. Otherwise, it will be reversed, *and the cause remanded for a new trial.*

NOTE.—See INDEX to this and to previous volumes, titles "Limiting Liability," "Damages"; also "Notes" on said subjects.

See note to next case.

WESTERN UNION TELEGRAPH COMPANY v. DOUGHERTY.

Arkansas Supreme Court, Feb. 14, 1891.

(54 Ark. 231.)

FAILURE TO DELIVER TELEGRAM.—LIMITING TIME TO PRESENT CLAIM.

A stipulation in a telegraph blank that all claims for damages for failure, delay or error in transmission, must be presented in writing within a specified time, is valid, and failure to observe it will bar a recovery.

Cases of this series cited in opinion: *Cole v. W. U. Tel. Co.*, vol. 1, p. 707; *Heimann v. W. U. Tel. Co.*, vol. 1, p. 581; *Massengale v. W. U. Tel. Co.*, vol. 1, p. 724; *W. U. Tel. Co. v. Rains*, vol. 1, p. 697.

APPEAL by defendant below from judgment of Circuit Court, Jackson county.

U. M. & G. B. Rose, for appellant.

The appellee *pro se*.

HUGHES, J.: This is an appeal from a judgment for fifty

dollars against the appellant, in favor of the appellee, to compensate him for damages sustained by the failure of appellant's servants to deliver a telegram sent by appellee from Newport to Clarendon, Ark. There was printed upon the face of the blank form on which the telegram was written, these words :

The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

The Circuit Court made the following declaration of law in the case : "The condition in reference to delay in presenting claim has no application to a failure to deliver caused by the negligence of defendant's agents." The only controversy in the case is over the correctness of this declaration, and the solution of this depends upon the reasonableness and validity of the above stipulation on the blank of the telegraph company, upon which the message was written by appellee's agent, and sent over appellant's telegraph line.

It has been several times held by this court that a common carrier may limit its liability by contract, though it can not stipulate against its own negligence or the negligence of its servants. The question is not one of power or right to make regulations, but of reasonableness of the regulations. The stipulation that the company would not be liable, where the claim is not presented within sixty days, was an agreement of the plaintiff with the telegraph company, and was not in violation of any statute, and, if reasonable, and not against public policy, was binding upon him. We know of no principle of the common law that would prohibit it. It was not a contract to cover the negligence of the telegraph company. It was a stipulation against the delay and neglect of the plaintiff in presenting his claim, and it does not appear unreasonable. By means of the character of the business, and the great number of messages sent over the lines of a telegraph company, and the importance of early information of claims, to enable

the company to keep an account of its transactions, and the impossibility of recalling them all and accounting for them from memory, after the lapse of a considerable period of time, it does not appear that a stipulation that a claim for damages should be presented, in writing, within sixty days from the time the message is sent, is unreasonable. *Wolf v. West. U. Tel. Co.*, 62 Pa. St. 87; *Young v. West. U. Tel. Co.*, 63 N. Y. 163; *Cole v. West. U. Tel. Co.*, 33 Minn. 227; *Helmman v. West. U. Tel. Co.*, 57 Wis. 562.

Such a condition is not only not a stipulation against the negligence of the company, but it implies that a liability may be incurred for negligence; and it requires that one who seeks to recover damages for such negligence shall present his claim in writing within sixty days or be held to have waived it. "*Conventio vincit legem.*" *Massengale v. West. U. Tel. Co.*, 17 Mo. App. 257. "When a definite term is fixed, the question of its reasonableness is to be determined by the court." *Id.* In the above case, thirty days was held to be a reasonable time, and twenty days have been held sufficient.

We know of no public policy that would be violated by conceding to a competent person the right to make a reasonable contract; and it is not unlawful for such a person to limit himself to less time than would be allowed by the statute of limitations, within which to assert his claim for damages for violation of a contract. Such a one may renounce a privilege allowed him by law, and such renunciation will bind him. It is said that "statutes of limitation prohibit, not the limitation of action, but the indefinite postponement of them." *Greenhood on Public Policy*, p. 305; *N. W. Ins. Co. v. Phoenix Oil Co.*, 31 Pa. St. 448; *Wolf v. West. U. Tel. Co.*, 62 Pa. St. 87; *West. U. Tel. Co. v. Rains*, 63 Tex. 27. See *Gray on Telegraphs*, p. 62.

The authorities are almost uniform in maintaining the reasonableness and validity of such a stipulation.

The third declaration of law made by the Circuit Court

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was erroneous for the reasons above indicated ; wherefore the judgment is reversed, and the cause is remanded for a new trial.

NOTE.—See INDEX to this and to previous volumes, title “Limiting Time.” See note, vol 2, p. 477.

This case is cited in *Sherrill v. W. U. Tel. Co. post.*

For earlier Arkansas cases upon duties and liabilities of telegraph companies, see vol. 1, p. 528 ; vol. 2, pp. 474, 477, 479.

WESTERN UNION TELEGRAPH COMPANY V. TAYLOR.

Georgia Supreme Court, Feb. 24, 1890.

(84 Ga. 408.)

PENAL TELEGRAPH STATUTE.—ACTION BY ADDRESSEE.—BAR OF FORMER ACTION.

Under a statute imposing a penalty upon telegraph companies for lack of impartiality, good faith and due diligence, to inure to the benefit of either sender or addressee, to be recovered “by a suit in a justice’s or other court having jurisdiction thereof,” *held*, that justices’ courts having under the Constitution only jurisdiction in actions *ex contractu*, the Legislature could not invest them with jurisdiction in such an action ; and hence that an action by the addressee of a telegram for the statutory penalty was not barred by a judgment in favor of the defendant in an earlier action brought in a justice’s court by the sender of the message. Even payment by the company of the expenses of the plaintiff incurred by reason of non-delivery of the message would not, unless received in full settlement or by way of accord and satisfaction, bar an action for the penalty.

Cases of this series cited in opinion : *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 682 ; *W. U. Tel. Co. v. Buchanan*, vol. 1, p. 1 ; *W. U. Tel. Co. v. McKibben*, vol. 2, p. 525. .

ERROR from City Court of Macon. Facts stated in opinion. Appeal by defendant below.

Guerry & Hall, for plaintiff in error.

M. G. Bayne, by brief, *contra*.

BLECKLEY, Chief Justice: The action was by Mrs. Taylor against the telegraph company to recover a penalty of \$100 for failure to deliver to her a telegram sent from Macon to Brunswick by Bayne, and addressed to her. It was founded on the act of 1887 (pamph. p. 111), which reads as follows :

Every electric telegraph company with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dispatches, whether from other telegraph lines or from individuals ; and on payment or tender of the usual charge, according to the regulation of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of one hundred dollars, which penalty may be recovered by a suit in a justice's or other court having jurisdiction thereof, by either the sender of the dispatch or the person to whom sent or directed, whichever may first sue : Provided, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company ; and said penalty and said damages may, if the party so elect, be recovered in the same suit. Such companies shall deliver all dispatches to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same ; Provided such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is. In all cases the liability of said companies for messages in cipher, in whole or in part, shall be the same as though the same were not in cipher.

The company pleaded specially in bar of the action that Bayne, the sender of the message, had sued, prior to the filing of this suit, for the same penalty in a justice's court, and that a recovery was had by the company. The plea alleged that the justice's court was a court of competent jurisdiction, but upon motion of plaintiff's counsel, the plea was stricken on the ground that the justice's court had no jurisdiction. The jury having found for the plaintiff, the company moved for a new trial because of this ruling, and on various other grounds. This motion was overruled.

1. The general scheme of the Constitution in conferring jurisdiction upon the inferior courts which it specifies, is to deal exhaustively with the subject matters — which it men-

tions and enumerates. This scheme extends also, even as to the Superior Court, to means and modes of exercising jurisdiction, as, for instance, new trials and writs of *certiorari*. *Pitts v. Carr*, 61 Ga. 454; *Maxwell v. Tumlin*, 79 Ga. 570; *Pope v. Jones*, id. 487. Doubtless the Legislature might by statute confer additional jurisdiction on some of the courts and magistrates mentioned in the Constitution, but to do so the material for such superadded jurisdiction would have to be drawn from other subject matters, that is, from such as the Constitution has not dealt with expressly in making distribution of judicial powers among the inferior courts, etc., which it enumerates. The act of 1887, above recited, is certainly a legislative attempt to clothe justices' courts with jurisdiction over actions for penalty, and whether the attempt can be held efficacious or not depends upon a right classification of such actions with reference to article VI, section VII, paragraph II (Code of 1882, sec. 5153), of the Constitution of 1877. The paragraph reads as follows:

"Justices of the peace shall have jurisdiction in all civil cases arising *ex contractu*, and in cases of injuries or damages to personal property, when the principal sum does not exceed one hundred dollars, and shall sit monthly at fixed times and places; but in all cases there may be an appeal to a jury in said court, or an appeal to the Superior Court under such regulations as may be prescribed by law." The corresponding provision in the Constitution of 1868 (Code of 1873, sec. 5104) was as follows:

"The justices of the peace shall have jurisdiction except as hereinafter provided, in all civil cases where the principal sum claimed does not exceed one hundred dollars, and may sit at any time for the trial of such cases; but, in cases where the sum claimed is more than fifty dollars, there may be an appeal to the Superior Court, under such regulations as may be prescribed by law." It is manifest that the latter Constitution intended to narrow the earlier one in respect to the jurisdiction of

justices' courts over civil cases. Both Constitutions fix the same limit as to amount, but in one there is no limit whatever as to the nature of civil cases over which jurisdiction may be exercised, save where exclusive jurisdiction is conferred on some other court, while in the other the cases are such only as arise *ex contractu* or from torts to personal property. Though the Legislature may, perhaps, confer at will jurisdiction upon justices' court or justices of the peace touching some subject-matters, the subject-matter of "civil cases," in so far as these courts or magistrates can take cognizance of the same, is dealt with exhaustively by the Constitution. The Legislature has no more power to invest them with jurisdiction over civil cases not arising *ex contractu*, or from torts to personal property, than over cases involving more than \$100 principal, or those arising *ex delicto* from injuries to real property. It follows that, unless an action for a penalty is one arising *ex contractu* within the sense and meaning of the Constitution, the justices' court which entertained and decided the suit brought by Bayne, the sender of the message, against the company, was without jurisdiction, for it is manifest that the suit was not for injury or damage to personal property.

2. The decisive question, then, is whether an action for the penalty imposed upon telegraph companies by the act of 1887 is one arising *ex contractu*. Had the expression been civil cases in form *ex contractu*, there would have been no doubt as to its embracing actions for a penalty, for debt is a form of action *ex contractu*; and that debt upon a statute for a penalty definite in amount was generally, if not always, maintainable, is quite certain. 1 Chit. Pl. 112, 371-375; *Bullard v. Bell*, 1 Mason, 299. But, though in form *ex contractu*, the action for a penalty was, and still is, founded upon a tort. 1 Chit. Pl. 45; *Chaffee v. U. S.*, 18 Wall. 516; *Martin v. McKnight*, 1 Overton, 390. In *McCoun v. R. R. Co.*, 50 N. Y. 176, which was a suit brought to recover a penalty or forfeiture under a statute to prevent extortion by railroad companies,

ALLEN, J., said: "Upon the question actually decided by the court below, I am of the opinion that that court erred in holding the summons to have been regularly issued under the first subdivision of sec. 129 of the Code. The actions within that subdivision must 'arise on contract, and be for the recovery of money only.' This action is for the recovery of money only, and in that respect is within the provisions of the subdivision, but is not upon contract. That term was used in its ordinary and proper sense. A contract is a drawing together of minds until they meet, and an agreement is made to do or not to do some particular thing. It may be express, or it may be implied or inferred from circumstances, and this implication is but the result of the ordinary and universal experience of mankind. If A borrows money of B, the courts may imply a promise to repay the money, for the universal experience is that in such a case a promise is exacted and made. An implied promise or contract is but an express promise, proved by circumstantial evidence. It is quite distinct from that fiction by which a statute liability has been deemed sufficient to sustain an action of *assumpsit*, upon the ground that a party subjecting himself to the penalty or other liability imposed by statute has promised to pay it. That feature does not suppose a contract, but simply a promise *ex parte*. In this view, every man promises not to trespass on his neighbor's property, or to commit an assault upon his person, and an action of *assumpsit* might be brought and summons issued, under the first subdivision of section 129, for a breach of this implied contract to observe the laws. The Code was not dealing with a legal fiction in prescribing a form of summons in actions arising on contract. A statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party." And PECKHAM, J., in the same case, said: "Is this 'an action arising on contract?' It is an action for a penalty for violating a statute. It is claimed to arise on contract, upon the principle stated in 3 Black Com. 161, whereby a forfeiture

imposed by the by-laws of a corporation, upon any that belong to the body, immediately creates a debt, for which an action of debt will lie by the party injured. This principle is declared by Blackstone to be 'an implied original contract to submit to the rule of the community whereof we are members.' He then adds that the same reason may, with equal justice, be applied to all penal statutes. This principle, if carried out by the same reasoning, would abolish all actions of tort. The implied original contract to obey all statutes, by the same principle and the same reasoning, extends to all laws, whether statutory or common law. It is surely not confined to the obeying of all statute law simply. Thus *assumpsit*, if not debt, would lie for an assault and battery, or for arson, etc. I incline to think that this provision of the Code had no reference to this fiction of the law of an implied original contract to obey the laws of the land by each member of the community. But it meant what it plainly says. In sec. 53 of the Code, 'an action for a penalty' is stated as impliedly different from an action on contract for the payment of money, and a justice of the peace is expressly given jurisdiction of both. The Code thus recognizes the difference between actions upon contract and an action for a penalty. It is not enough that the recovery is to be for 'money only,' but the action must arise on contract also, to bring the case under the first subdivision. I think it plain that this action does not arise on contract." The large and loose meaning given to contracts by Blackstone (3 Com. 158-160), as including all obligations, even those arising out of the social compact, is too comprehensive to serve as a guide to the real meaning of the clause of the Constitution which we are considering. Works on contracts generally have confined the term "contract" within much narrower limits. Mr. Bishop is the only writer, so far as we know, who, in a work devoted to contracts solely, has endeavored to broaden his definition of the term so as to make it reach and include what

LOWRIE, J., in *Hertzog v. Hertzog*, 29 Pa. St. 467, 468, denominates "constructive contracts," which he says are "fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied." For Mr. Bishop's definition, see Bish. on Con. sec. 22; and that he intended to include, like Blackstone, the fictitious case of a statutory penalty, see secs. 182-206. But it may be said that there is an actual contract from which the present action arises, namely, that made by Bayne as the sender of the message. That contract, however, with all its consequences except the penalty, is left intact by the act of 1857. The penalty is not given, in whole or in part, as compensation in damages for a violation of that contract. On the contrary, both the sender, with whom the company had a contract, and the person to whom the telegram was addressed, and with whom the company had no contract, are left in full possession of all their rights, outside of penalty, in every respect. That the penalty is imposed solely for the wrongful violation of a public duty is manifest, and it seems to us to make no difference that this particular instance of that duty had its origin in contract. The case belongs to that particular class so well described by Mr. Bishop in his work on Non-Contract Law, secs. 73, 74, in which he says: "Though a tort is a breach of duty which the law, in distinction from a mere contract, has imposed, yet the imposing of it may have been because of a contract, or because of it and something else combining, when otherwise it would not have created the duty. In such a case, commonly, the party injured by the non-fulfilment of the duty may proceed against the other for its breach, or for the breach of contract, at his election. Thus, because a common carrier, whether of goods or passengers, is a sort of public servant, the law imposes its duties upon him, a breach whereof is a tort, though there is also a contract which is violated by the same act." The principle here announced is the one recognized by this court in *Head v. Georgia Pacific R. R. Co.*, 79 Ga. 358, and in other cases. A striking instance of its

application will be seen in the case of *Tattan v. Ry. Co.*, 2 El. & El. 851, in which the terms "action founded on contract," and "action of contract," were under construction. See, also, *Pontifex v. Ry. Co.*, 3 Law Rep. Q. B. Div. 27. The Supreme Court of Indiana, in adjudicating upon a statute in some respects identical with our own, has held that the penalty is for a breach of duty, and not damages for the breach of contract. *W. U. Tel. Co. v. Pendelton*, 95 Ind. 12. In *Schaffer v. McNamee*, 13 Sgt. & Rawle, 44, the words, "causes of action arising upon contract, either express or implied," used in conferring jurisdiction upon justices of the peace, were held to be limited to the case of an agreement or understanding immediately between the parties; and GIBSON, J., said: "It is evident that it is not the form of the action, but the nature of the subject-matter of it, which must decide the question of jurisdiction. Actions of debt often arise *ex maleficio*, and where there is not the semblance of a contract, as in all cases of penalties imposed by statute; for there the debt is created by the law, and not by the agreement of the parties." Accordingly it was held in *Zeigler v. Gram*, id. 102, that a justice of the peace has no jurisdiction of debt for a penalty imposed by a statute for not entering satisfaction of a judgment. While the term "contract," used in its very widest sense, would, as may be seen from Blackstone and Bishop, take in penalties incurred by violating a statute, the ordinary use of the word in the common law is less comprehensive. The use of it in our Code is attended with a precise definition: "A contract is an agreement between two or more parties, for the doing or not doing of some specified thing." Section 2714. A contract of record is then defined; then specialty is defined; and section 2718 adds. "All other contracts than those specified above are termed simple contracts." It seems obvious that a penalty imposed by statute is not embraced either in the language or the meaning of the Code. What the Code says of actions, sections 3250 *et seq.*, would seem to exclude a certain class of penalties from civil

actions altogether, and put them in a class denominated penal actions. "A civil action is one founded on private rights, arising either from contract or tort." "A penal action is one allowed in pursuance of public justice under particular laws. If no special officer is authorized to be the plaintiff therein, the State or the governor, or the attorney or solicitor-general, may be the plaintiff." Sections 3253-4. The technical expression, "arising *ex contractu*," used by the Constitution, is found in section 3261 of the Code, which says: "All claims arising *ex contractu* between the same parties may be joined in the same action, and all claims arising *ex delicto* may in like manner be joined." The words "actions *ex contractu*" are found in section 2912, and perhaps in other sections. We think a penalty such as that under consideration arises *ex delicto*, and consequently that a justice's court has no jurisdiction, and can have none conferred upon it by statute, of any suit to recover such a penalty. We are forced to this conclusion, and do not reach it of our own choice; for we agree with the Legislature in thinking it desirable for justices' courts to have jurisdiction of this class of actions. A prompt and cheap remedy in such cases would subserve the public convenience, and be conducive to the attainment of justice in matters of daily concern, embracing almost a countless number of transactions, widely diffused throughout the State.

3. It follows that there was no error in striking the plea; for a previous suit in a court having no jurisdiction could not result in anything but a void judgment, and such a judgment is open to attack any and everywhere. Code, secs. 3594, 3828. The suit itself was a legal nullity.

4. It seems that the plaintiff, before she brought her action for the penalty, made out and presented to the company an account for her expenses incurred by a needless trip from Brunswick to Macon, this trip being made in consequence of her failure to receive the message which Mr. Bayne, her attorney, had ordered to be sent by telegraph. It does not appear whether this account for expenses was

paid by the company or not, but no settlement by way of accord and satisfaction is pleaded or proved, nor would the mere payment of such expenses bar an action for the penalty. The statute leaves the right to damages where it was before the penalty was imposed. It has been correctly held that paying back the amount received for sending a dispatch, unless it is agreed that such payment shall be in full of all the party has a right to recover, will not hinder an action for the penalty. *W. U. Tel. Co. v. Buchanan*, 35 Ind. 430.

5. The action treated the penalty as resulting from a failure to deliver the telegram, and not from a failure to transmit it; nevertheless, delay in transmitting might be considered by the jury as involved in a failure to deliver. But, even if the charge of the court upon this subject was inaccurate, it did no harm, the failure to deliver promptly being fully established by the evidence. The same may be said as to any and all verbal inaccuracies which the charge may have contained.

6. We see no reason to question the sufficiency of the evidence to warrant the verdict. *Western Union Telegraph Co. v. McKibben*, 114 Ind. 511.

Judgment affirmed

NOTE.—See INDEX to this and previous volumes, title, "Receiver or Addressee." See notes, vol. 1, p. 89; vol. 2, p. 646. See note to *Moore v. W. U. Tel. Co.*, *post*.

HILL V. WESTERN UNION TELEGRAPH COMPANY.*Georgia Supreme Court, May 7, 1890.*

(85 Ga. 425.)

ERROR IN TELEGRAM.—LIMITING TIME.

A stipulation in a telegraph blank to the effect that the company will not be liable unless a written claim is presented within sixty days after sending the message, is reasonable and obligatory; and the sender of a telegram written upon such a blank is chargeable with knowledge of its contents.

Such a stipulation may, however, be waived by the agent who received the message for transmission, and is so waived by his refusal, upon oral demand made, to pay damages, upon the sole ground that the company was not to blame.

Cases of this series cited in opinion: *Redpath v. W. U. Tel. Co.*, vol. 1, p. 40; *Grinnell v. W. U. Tel. Co.*, vol. 1, p. 70; *Womack v. W. U. Tel. Co.*, vol. 1, p. 454; *W. U. Tel. Co. v. Edsall*, vol. 1, p. 715; *Heimann v. W. U. Tel. Co.*, vol. 1, p. 531; *Cole v. W. U. Tel. Co.*, vol. 1, p. 707; *W. U. Tel. Co. v. Meredith*, vol. 1, p. 643; *W. U. Tel. Co. v. Jones*, vol. 1, p. 580; *W. U. Tel. Co. v. Yopet*, vol. 2, p. 553; *Massengale v. W. U. Tel. Co.*, vol. 1, p. 724; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404.

APPEAL by plaintiff below from judgment of nonsuit granted upon trial at City Court, Floyd county.

Wright & Harris, for plaintiff in error.

Bigby & Berry and *C. Rowell*, for defendant in error.

BLECKLEY, C. J.: It was certainly a gross error to substitute \$6.25 in the dispatch delivered by the company for \$250 in the dispatch as sent. Such an error unexplained is ample evidence not only of negligence, but of gross negligence. The motion for a nonsuit which the court granted was based on the single ground that no demand or claim for damages had been made in writing within sixty

days, as required by the rules and regulations of the company, printed on the blank upon which the message was sent.

1. The rule referred to was in these terms: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." This was printed in small type at the head or top of the written message, and lower down on the same page were the words, also in small type: "Send the following message subject to the above terms, which are hereby agreed to." At the bottom of the page were the words, in large type: "Read the notice and agreement at the top." The point was made in argument that the rule as to the mode and time of presenting a claim for damages was not obligatory upon the sender of the message, because not agreed to by him, nor even known to him, according to the evidence, until after this suit was brought. According to the weight of authority in like or analogous cases, he could by reasonable diligence have been aware of this rule, and by writing and signing the message on the same page upon which the rule was set forth he signified to the company both his knowledge of it and his assent to it. *Breese v. Western Union Telegraph Company*, 45 Barb. 274; affirmed in 48 N. Y. 132 (8 Am. Rep. 526); *Redpath v. Western Union Telegraph Company*, 112 Mass. 71 (17 Am. Rep. 69); *Grinnell v. Western Union Telegraph Company*, 113 Mass. 299 (18 Am. Rep. 485); *Western Union Telegraph Company v. Carew*, 15 Mich. 525; *Womack v. Western Union Tel. Company*, 58 Tex. 176 (44 Am. Rep. 644); *Western Union Telegraph Company v. Edsall*, 63 Tex. 668; *Beasley v. Western Union Telegraph Company*, 39 Fed. Rep. 181; notes to *Gillis v. W. U. Tel. Co.*, 4 Lawyer's Rep. An. 612; 2 Shearman & Redfield on Negl. 552.

2. It is also insisted that the rule is unreasonable, and for that reason not obligatory. We, however, think it reasonable, and many other courts have so considered it. *Greenhool* Pub. Pol. 507; 2 Thomp. Neg. 846-849; *Wolf v.*

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Western Union Telegraph Company, 62 Pa. St. 83; *Young v. Western Union Telegraph Company*, 65 N. Y. 173; *Heimann v. Western Union Telegraph Company*, 57 Wis. 562; *Cole v. Western Union Telegraph Company*, 38 Minn. 227; *Western Union Telegraph Company v. Meredith*, 95 Ind. 93; *Western Union Telegraph Company v. Jones*, id. 228; *Western Union Telegraph Company v. Yopst*, 118 Ind. 249; *Massengale v. Western Union Telegraph Company*, 17 Mo. App. 257; *Beasley v. Western Union Telegraph Company*, 39 Fed. Rep. 181. For analogous cases, see *Express Co. v. Caldwell*, 21 Wall. 264; *Riddlesbarger v. Insurance Co.*, 7 Wall. 386; *Brown v. Insurance Co.*, 24 Ga. 97; *Underwriters' Agency v. Sutherlin*, 55 Ga. 266; *Greenhood Pub. Pol.* 505.

3. But while we are of opinion that the telegraph company was entitled to have the claim for damages presented in writing within sixty days after the message was sent, we think that the right could be waived, and that the evidence in the record tended to prove that it was waived, not indeed as to the time, but as to the mode of making the demand. The evidence indicates that if any damage was sustained, it occurred in February, 1889, immediately after the telegram was sent. Wright, the sender of the message, who acted as agent and attorney for Hill, the plaintiff, testifies that about three weeks after the damage occurred he went to Woodruff, the manager of the company's business at Rome, and told him that Hill had been damaged four or five hundred dollars, and that the company would have to pay Hill for the same. Woodruff said to wait a while, and he would investigate and find where the blame rested. In about two weeks thereafter, Wright met Woodruff, and asked what the company would do about it. Woodruff replied that the company was not to blame, and that Hill would have to look to the operator in Cedartown for the damages. That it was competent to make the demand upon the agent of the company on duty at the place from which the telegram was sent was ruled by this court in *Telegraph Co. v. Blanchard*, 68 Ga. 299. The agent

was not bound to recognize an oral demand. But if he did so, making no objection to it on the ground that it was not in writing, we think it was sufficient. So far from presenting this objection, the agent requested time for investigating the merits of the claim, and, after investigating, put the company's refusal to pay, not upon any want of sufficiency in the demand, but upon the non-liability of the company. According to a report which appears in 11 N. E. Rep. 16, the Supreme Court of Indiana ruled, in the case of *Telegraph Co. v. Yopst*, that a waiver of written demand resulted from a refusal to pay, put by the agent on the ground that the contract to send and deliver the telegram was illegal because made on Sunday. Though we find the case reported later, we have been unable to discover it in the Indiana Reports as decided on March 18, 1887, and reported in the book above referred to. Nevertheless we think the decision upon this question of waiver is sound on principle, and embodies a good exposition of Georgia law, whether it does so of Indiana law or not. To reach this holding, it is not necessary to differ from the St. Louis Court of Appeals in *Massengale v. Telegraph Co.*, 17 Mo. App. 257. In that case it was held that the oral promise of a general agent of a telegraph company to look into the matter was not a waiver of the condition requiring a demand to be made in writing. Here the matter was looked into, a decision made, and the result communicated.

The court erred in not submitting the case to the jury, and in granting a nonsuit.

Judgment reversed.

NOTE.—See INDEX to this and to previous volumes, title "Limiting Time." See note, vol. 2, p. 477.

See note to *Moore v. W. U. Tel. Co.*, *post*.

WESTERN UNION TELEGRAPH COMPANY V. COOLEIDGE.

Georgia Supreme Court, November 10, 1890.

(86 Ga. 104.)

GEORGIA TELEGRAPH ACTS.—LIMITING TIME TO PRESENT CLAIM.

A stipulation in a telegraph blank, limiting the time within which claims for damages for negligence in transmission of messages shall be presented, does not apply to an action for a statutory penalty.

Georgia Acts 1888-89, p. 175, does not repeal Acts 1886-87, p. 111.

Case of this series cited in opinion: *W. U. Tel. Co., v. Cobbs*, vol. 2, p. 474.

ACTION for statutory penalty. Appeal by defendant below. Facts stated in opinion.

Bigby & Berry, for plaintiff in error.

J. F. Daniel, contra.

BLANDFORD, J.: The controlling question in this case is whether the act passed by the General Assembly on the 12th of November, 1889, as to telegraph companies (Acts of 1888-9, p. 175), repeals the act passed on October 22nd, 1887 (Acts of 1886-7, p. 111,) relating to the same subject-matter. The last-named act is, "An act to prescribe the duty of electric telegraph companies as to receiving and transmitting dispatches, to prescribe penalties for violations thereof, and for other purposes." The first section of this act makes it the duty of every electric telegraph company with a line of wires wholly or partly within this State, and engaged in telegraphing for the public, to receive, during the usual office hours, all dispatches, whether from other telegraphic lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit and deliver the same with impartiality and

good faith, and with due diligence, under penalty of \$100, which penalty may be recovered in a justice's or other court having jurisdiction thereof, by either the sender of the dispatch, or the person to whom sent or directed, whichever may first sue. The first mentioned act (that of November 12, 1889) is declared by its title to be "An act to encourage and authorize the construction of telegraph lines in the State of Georgia, and conferring certain privileges, powers and penalties on the owners thereof, and to provide a penalty for divulging the contents of any private message by any person connected with such telegraph company." The first section authorizes any telegraph company chartered under the laws of this State, or any other State of the United States, to construct, maintain and operate lines of electric telegraph upon, along and over the highways and public roads, and across and under any waters in this State, by the erection of posts, piers, abutments and other fixtures (except bridges), necessary to sustain the wires of its lines; but it shall not incommode the use of any highways, or public roads, or endanger or intercept the navigation of any waters. The second section makes it the duty of every telegraph company to receive dispatches from and for any other telegraph company or association, and from or for any person, on payment of the usual charge for the transmission of dispatches, according to the regulations of the company, and to transmit the same faithfully and impartially, and for every neglect or refusal so to do, the company shall forfeit a sum of not exceeding \$100, to be recovered in an action of tort, by the person, association, or company sending or desiring to send the dispatch. The third section prohibits telegraph companies or associations from discriminating against other companies, associations, or individuals sending or desiring to send a dispatch, and provides a penalty of a sum not exceeding \$100 to be recovered in an action of tort. The fourth section provides that it shall be the duty of every company or association to transmit all dispatches in the order in which they are received, under a like

penalty of \$100, but making an exception in favor of proprietors or publishers of newspapers. The fifth section provides a penalty for any person connected with any telegraph company in this State who shall divulge the contents of any private telegram. We have thus given a summary of the act of 1889. The title of the act would seem to be to authorize and encourage the construction of telegraph lines in this State, and to confer certain privileges and powers upon such companies, and penalties upon the owners thereof, and to provide a penalty for divulging the contents of any private message, by any person connected with such telegraph company. The title of the act seems to contemplate more than one subject-matter, for it looks to the encouragement and authorization of telegraph lines to be constructed in the State of Georgia, and confers privileges, powers and penalties upon the owners thereof; while, at the same time, it also provides a penalty for divulging the contents of a private message, by any person connected with such telegraph company. And so it appears all through the act, after the first section thereof, that there are other matters contained therein different from that of authorizing and encouraging the construction of telegraph lines within the State. It seems to us that the matters contained in the second and third sections of this act are not germane to those contained in the first section; and so with the other sections. So it would appear that this act is in violation of that provision of the Constitution which prohibits any act of the Legislature from containing more than one subject-matter, and, furthermore, it appears to us that this act, so far as it conforms to the title, applies only to such telegraph companies as might construct their lines after the passage of the same. We think that the Legislature did not intend to apply this act to any telegraph company which had been, theretofore, constructed in this State, and hence we think that the act does not operate to repeal the act of 1887 above referred to.

Again, it is insisted by counsel for the plaintiff in

error that, by the terms of the dispatch, all claims for damages on account of sending the same should be made in writing within a certain time after the sending of the dispatch, otherwise that the company would not be liable; and that the defendant in error in this case made no claim upon the telegraph company for damages before bringing this suit. We do not think that rule of the telegraph company applies to a case like this. This is not an action for damages, but it is an action brought to recover a penalty under a statute, and therefore we think that the condition printed on the telegraph blanks of the company, requiring all claims to be made in writing within sixty days, does not apply to a case such as this. We are aware that there are decisions of other courts in the United States in conflict with this opinion, but there are many others, however, fully in accord with it. The case of *The Western Union Telegraph Co. v. Cobbs*, 47 Ark. 344 (1 S. W. Rep. 558), fully sustains our position.

These are the main questions in the case, and the judgment of the court being in accordance with the views we have herein expressed, it is therefore

Affirmed.

NOTE.—See INDEX to this and to previous volumes, title "Limiting Time." See note, vol. 2, p. 477. See note to *Moore v. W. U. Tel. Co.*, *post*. This case is cited in *Sherrill v. W. U. Tel. Co.*, *post*,

J. M. GRAY v. THE WESTERN UNION TELEGRAPH COMPANY.

Georgia Supreme Court, July 8, 1891.

(87 Ga. 350.)

DELAY OF TELEGRAM.—PENALTY.—ILLEGAL PURPOSE.

(Head-note by the court):

After receiving a telegram for transmission, and accepting payment for the same, the company cannot defend an action for the statutory penalty incurred by failure to deliver it with due promptness, on the ground that the contents of the telegram related to a sale of futures, and consequently to an illegal transaction.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Ferguson*, vol. 1, p. 266; *Smith v. W. U. Tel. Co.*, vol. 2, p. 389; *Cothran v. W. U. Tel. Co.*, vol. 2, p. 496.

APPEAL by plaintiff below from judgment of Superior Court, Houston county.

Hardeman, Davis & Turner and *W. C. Winslow*, for plaintiff.

Gustin, Guerry & Hall, for defendant.

BLECKLEY, Chief Justice: That the United States mail might lawfully carry either a sealed letter or an open circular from Fort Valley to Macon, though the contents of the document related to the purchase and sale of futures, is certain. Equally certain is it that a common carrier between these points might innocently transport a passenger whose known business was to make a trip for the exclusive purpose of buying and selling futures, or might carry and deliver a bundle of stationery intended by the consignee for use in his business as a dealer in futures. In

each of these cases, the object sought to be subserved by the writer, the passenger, or the consignee would simply be irrelevant. To consider it would be to introduce moral distinctions not pertinent to the functions which the mail or the carrier was designed to perform. In like manner, under the statute on which the present action is founded, the moral purpose of a telegram is immaterial, provided it is not designed to prompt or promote the commission of a crime or a tort. Telegraph companies, like common carriers, are voluntary servants of the general public. They exercise a public employment, and offer themselves for the transaction of business in behalf of every person who seeks to engage their skill and their special facilities for a peculiar class of work. Their relation to the public imposes upon them the duty of undertaking as well as the duty of performing, and the violation of either duty is a misfeasance, a tort. It is the equivalent, therefore, of an affirmative interference by a mere private person to hinder or obstruct communication. For one of these companies not to receive or not to transmit and deliver a dispatch when it ought to do so, is more than a refusal to contract or than the breach of a contract, it is a wrong as pronounced as would be that of a person who should forcibly exclude another from the telegraph office and prevent him from handing in a dispatch which he desired to lodge for transmission. In dealing with the wrong as such, the element of contract is not involved. Why should this company not have transmitted and delivered the reply which the plaintiff sent to his correspondent in answer to a dispatch from the latter which the company had brought to him by telegraph? The dispatch was: "Shall I draw for more *bonus*? Answer quick." The reply was: "If necessary, draw for more *bonus*." It is admitted that the subject of this correspondence was a transaction in futures, a species of gambling of the worst description, and it is on this ground that the failure of the company is sought to be justified. But the statute which we are considering makes by its letter no exception; it declares that every company

of this description "shall, during the usual office hours, receive dispatches, whether from other telegraphic lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith, and with due diligence, under penalty of \$100," etc. Acts 1887, p. 111. In construing and administering the statute, what exceptions can the courts make by implication? Doubtless, a dispatch to be entitled to transmission must be free from open indecency or profanity, and perhaps other vices of language might condemn it, but supposing it to be proper in tone and expression, we should say that the company would have no concern with its import unless it sought to subserve either crime or tort. If it disclosed either of these objects, it seems to us that the company, for its own protection, might and should refuse to handle it. It would be unreasonable to suppose that the Legislature intended telegraph companies to aid in the perpetration of crimes or actionable wrongs, for this would be to constrain them to do by legislative mandate what they would have no right to do by their own choice. But, on the other hand, any dispatch which a company could lawfully transmit by its own choice, the statute obliges it to transmit and deliver. The power of voluntary selection is denied, for every company is required to transmit and deliver "with impartiality and good faith." A dispatch cannot be rejected on account of its subject-matter, unless by sending it the company would or might subject itself or its servants either to indictment or a civil action. This is a rational test, and one that may fairly be presumed to coincide with legislative intention. If before the statute was enacted, a telegraph company could at its own will serve one customer and decline to serve another, the dispatches of the two being exactly similar, this option no longer exists. All customers are now to be treated alike. If one can correspond by telegraph touching his speculations in futures, all may do so. There can be no discrimination, no favoritism. The company cannot waive morality for one,

and stand on it against the other. Now, in this State it is neither a crime nor a tort to speculate in futures. It is gross immorality, and conflicts with public policy, but it is not indictable nor actionable. On the contrary, by a recent statute dealers are recognized and tolerated on condition of registering themselves and paying a fixed tax. Acts 1888, p. 22. It was certainly the legal right of the company to transmit and deliver the dispatch sent by the plaintiff if it had elected to do so. It would have incurred no penalty, subjected itself to no action or indictment. Moreover, it actually undertook to do it, and received pay for the service; and it had already transmitted and delivered the dispatch to which this was a reply. Why serve one of the parties and not the other? But we hold that it was bound to serve both, for the reason that the law leaves it free to serve them. Where there is such a statute as we are construing, it cannot be a matter of option to obey or disobey. On the contrary, unless some other law forbids what the letter of the statute commands, the letter must prevail. In adjudicating upon a like statute, the Supreme Court of Indiana, in *W. U. Tel. Co. v. Ferguson*, 57 Ind. 493, held that the company when sued for the penalty incurred by failing and refusing to transmit a dispatch expressed in these terms: "Send me four girls on first train to Francisville, to tend fair," could not defend by setting up that the dispatch was ambiguous, and that on account of certain extrinsic facts the company had reasonable cause to believe and did believe that the girls wanted were prostitutes, and that the object of the message was to draw prostitutes to the fair. It seems to us that this decision was correct. It did not appear that the company or its servants would have been subject either to indictment or to action if the girls called for had been sent and had attended the fair. When a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company in dealing with it either civilly or criminally for transmitting the dispatch, and hence it would be the duty of the company, in deciding whether to transmit or

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not, to give the benefit of the doubt to the sender. On no other rule would it be practicable for telegraph companies to perform their legitimate functions as servants of the general public. They could not wait to question and investigate the motives of those who offer ambiguous dispatches for transmission. Indeed in this State they are required by the same statute we are now discussing to forward dispatches written in cipher, and this enables the sender not only to conceal his motives partially, but to conceal them altogether. This may serve to suggest how little the company is concerned with unlawful or improper motives, unless they are plainly disclosed on the face of the dispatch.

The cases of *Bryant v. W. U. Tel. Co.*, 17 Fed. Rep. 825, and *Smith v. The Same*, 84 Ky. 664, 2 S. W. Rep. 493, were not ruled upon any statute, but upon principles of general law. Doubtless it is true that a telegraph company is not bound, even when it contracts to do so, to furnish to "bucket shops" reports of the market prices of stocks and provisions nor to allow "tickers" for the purpose to remain in the offices of these immoral establishments. But were the supplying the supplying of market reports and "tickers" for all applicants, "with impartiality and good faith," enjoined by statute, a different question, and one more germane to the present case, might arise. The Sunday messages adjudicated upon in some of the cases are also without relevancy, for the statute does not purport to prescribe duties except as to dispatches offered "during the usual office hours," meaning, of course, legal office hours. So far as we are aware, no decision of any court is to be found which holds it illegal for a telegraph company to receive and transmit messages relating to speculative transactions in futures, where that class of business has not been made penal by statute. That damages for the breach of a contract to correctly transmit a message of that nature cannot be measured by the results of such dealings was decided in *Cothran v. W. U. Tel. Co.*, 83 Ga. 25, but there is no suggestion in that decision that the broken con-

tract was unlawful. On the contrary, this language will be found in the opinion : " We think this standard cannot be invoked, for the reason that contracts relating to ' futures ' are illegal ; and we see not how an illegal contract can be called in to measure the damages sustained by reason of the breach of a legal contract." There may be strong reasons of public policy why legislation ought to prohibit all dealings in futures, and all communication by telegraph tending to foster or facilitate such dealings ; but in the present state of the law, no matter how reluctant telegraph companies man be to transmit and deliver messages of this class, especially if their reluctance arises after they have accepted pay for doing it, they have no option but to perform the service or pay the penalty. *Judgment reversed.*

NOTE.—See note to next case.

MOORE V. THE WESTERN UNION TELEGRAPH COMPANY.

Georgia Supreme Court, July 13, 1891.

(87 Ga. 618.)

FAILURE TO DELIVER TELEGRAM.—PENAL STATUTE.—"RESIDENT."

(Head-note by the court):

A transient visitor to a town or city, who furnishes to the company no definite address, is not a person residing in the same or within one mile of the station, in contemplation of the act of 1887, subjecting telegraph companies to a forfeiture for failing to deliver dispatches to residents.

APPEAL by plaintiff below from judgment of nonsuit granted by Superior Court, Crawford county.

Official report:

Moore sued the telegraph company for \$100 damages for failure to deliver to him at Knoxville, Crawford county, Georgia, where he was temporarily, a message sent to him

from Macon, Georgia. By another count he alleged that he had been damaged \$125 by such failure to deliver by being deprived of certain business. Upon the trial he introduced the telegraphic dispatch. It was admitted that it was delivered to defendant at its office in Macon at 11 o'clock A. M., on June 3, 1889, and that the charges for sending it to Knoxville were prepaid by the sender. The plaintiff came to Knoxville from Macon on the day before the message was sent; he saw the telegraph operator at the telegraph office, and told him that if any message should come for him to send it over to Knoxville; he remained in Knoxville until about sunset of the evening of June 3rd; then went into the country, and returned on the evening of the 4th, and went back to his home, in Macon, on the railroad; he stayed on and around the court-house square the most of the time while in Knoxville; he spent the night of the 3rd at a Mr. Wright's; everybody in Knoxville knew him, and he could easily have been found; the telegram has never been delivered to him; the telegraph office is within less than one mile of Knoxville, and of Wright's house; the telegraph operator told Wright he received the message about 2 o'clock on June 3rd, and, being busy, gave it to one Harris to carry to Knoxville to Moore.

A nonsuit was granted, and the plaintiff excepted.

W. S. Wallace, L. D. Moore and Hardeman, Davis & Turner, by brief, for plaintiff.

Gustin, Guerry & Hall, for defendant.

SIMMONS, Justice: The facts will be found in the official report. Under these facts the grant of a nonsuit was right. By the express terms of the statute (Acts 1887, p. 112) the penalty is imposed upon these companies for failure to deliver messages to persons to whom they are addressed, who at the time reside within one mile of the telegraph office, or within the town or city in which the office is. The act is clearly intended to apply to only a part of the public, and

it imposes this duty on the company, under this penalty, when it is dealing with that class which come within the strict letter of the act. The act is a penal one, and must be strictly construed; any other construction placed upon it would work great hardship upon the telegraph companies. It would subject them to this penalty in many cases where, from the very nature of things, it would be impossible for them to avoid the penalty. The Legislature evidently designed to limit the operation of the law to that class of persons who come within the proviso to the second section of the act. Moore was residing in the city of Macon, and was merely a transient visitor to the town of Knoxville; and, although he requested the telegraph operator at the station near Knoxville to send him any message that might be received for him there, he gave no definite address. If, after notifying the operator that he would be in Knoxville, and to send the messages to him there, he had given him a definite address, such as a given street and number, or the name of the owner of a particular house where the message should be delivered, perhaps he would have come within the spirit of the law, if not the letter of it. But it would be unreasonable to hold telegraph companies bound to deliver messages to strangers in a town or city when they have no means of knowing the place at which the message can be received. If the person to whom the message is sent resides in a town or city, or within one mile of the station, then it is the duty of the telegraph company to ascertain where he resides; but if he is a transient visitor or a stranger, with no fixed abode, it might be impracticable for the company or its agents to ascertain the place where the message could be delivered.

The action was also for damages in the loss of certain business by the non-delivery of the dispatch. There was no proof submitted to the court and jury upon this question, and the court did not err in granting a nonsuit upon both counts in the declaration.

Judgment affirmed.

Telegraph Cable Co. v. Lathrop et al.

NOTE.— For telegraph cases decided in Georgia earlier than the above and the four preceding, see note, vol. 2, p. 499.

In *W. U. Tel. Co. v. Nunnally*. Georgia Supreme Court, Jan. 14, 1891 (86 Ga. 503), held that by the Code an action under the act of 1887 for the recovery of the penalty therein prescribed is barred unless brought within one year from the time the company's liability was discovered, or could have been discovered with reasonable diligence.

POSTAL TELEGRAPH CABLE COMPANY V. CHARLES D.
LATHROP ET AL.

Illinois Supreme Court, January 21, 1890.

(181 Ill. 575.)

ERROR IN TELEGRAM.— DAMAGES.

Where enough appears in a message, as written and presented for transmission, to show that it relates to a commercial business transaction between sender and addressee, the telegraph company may properly be charged with the actual damages resulting from negligence in its transmission.

Cases of this series cited in opinion : *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14 ; *Tel. Co. v. Griswold*, vol. 1, p. 329 ; *Marr v. W. U. Tel. Co.*, vol. 2, p. 720 ; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404 ; *Pepper v. W. U. Tel. Co.*, vol. 2, p. 756 ; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99.

APPEAL by defendant below from judgment of Appellate Court, First District.

Action for damages for errors in transmission of two telegrams, as follows :

First message, "Please buy in addition to thousand August, one thousand cheapest month," changed to "Please buy in addition two thousand August, one thousand cheapest month."

In second message, "seventeen" changed to "seventy."

James L. High, for the appellant.

Dexter, Herrick & Allen, for the appellees.

Mr. Justice WILKIN delivered the opinion of the court.

* * * * *

The controlling question in the case, so far as we are at liberty to pass upon it, arises on the refusal of the trial court to give the third instruction asked by appellant, as follows :

"The jury are instructed that the defendant is only liable for such damages, if any, as were actually contemplated, or which might reasonably be supposed to have been contemplated, by the parties in the delivery and receipt of the messages in the transmission of which the alleged errors occurred. And if the jury believe, from the evidence, that such messages were not sufficiently clear or precise to inform the agents of the defendant receiving them, of their meaning, and of the possible risk and damage which might result from mistakes in their transmission, and that such facts were not disclosed by the plaintiffs to the defendant or its agent, then the defendant can not be charged with having contemplated the special damages claimed by the plaintiffs in this special action, and plaintiffs are only entitled to recover the amount actually paid by them for the sending of such messages, with interest at 6 per cent. from the date of payment to the date of your verdict."

It is earnestly contended by counsel for appellant, that the messages, "Please buy, in addition to thousand August, one thousand cheapest month," and "Put stop order on five thousand December, at seventeen cents," were, unexplained, meaningless and unintelligible to the operator of appellant who transmitted them ; and, therefore, as in case of cipher dispatches, no special or consequential damages could have been reasonably contemplated by the parties when they were sent, and hence none can be recovered in this suit. This position is based on the rule of damages announced in *Hadley v. Baxendale*, 9 Exch. 341, and followed generally in this country as well as in England. In any view of that rule, as applied to this case,

the instruction is too narrow. The evidence shows that at the time of sending these dispatches appellees were, and had for some time prior thereto been, engaged in the business of jobbers in coffee, tea and sugar, in the city of Chicago; that Crossman & Bro. were commission merchants in New York, buying and selling coffee, rubber and hides on commission; that appellant had a branch office near the place of business of appellees, from which the messages in question were sent, and had frequently sent others pertaining to their business. It also tends to show that from business transactions in New York between appellant and the firm of Crossman & Bro. appellant knew the business in which the latter firm was engaged. It is in proof that during the month of June, 1887, and prior to the first mistake complained of, a number of dispatches were sent by appellee to Crossman & Bro. from appellant's Chicago office. One on the 13th read: "Please wire us to-day whether you do or do not execute our order for five thousand *bags*, as we must place it elsewhere if you decline." Another of the same date refers to "five thousand *bags*." It must, at least, be conceded that there is evidence tending to show that from their previous dealings appellant knew, or might by reasonable diligence have understood, the purport of these messages. Therefore, in determining whether or not the messages were sufficient to inform the operator of their meaning, and of the possible risk of loss to appellees by a mistake in transmitting them, the jury should have been left free to consider all the facts and circumstances proved in the case bearing on that question, whereas the instruction limits the inquiry to that which appears in the dispatches themselves, and to such facts as may have been disclosed to the defendant or its agent at the time they were sent. See 2 Thompson on Negligence, p. 857.

On the question as to how far mere indefiniteness in the language of a message will defeat a recovery for consequential damages against a telegraph company, the decisions cannot be said to be harmonious.

Counsel for appellant contends that the better line of authorities sustains the rule announced in this instruction, viz., that the operator who transmits a message must be able to understand its meaning as to quantity, quality, price, etc., as the sender and party to whom it is sent themselves understood it; otherwise it is said he can not reasonably be supposed to have contemplated damages as the probable consequence of a failure to correctly transmit it. While some of the cases cited go to that extent, especially where the message is in cipher, another line of decisions, and we think founded on the better reasons, hold that where enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it is sufficient to charge the company with damages resulting from its negligent transmission.

In *United States Telegraph Co. v. Wenger*, 55 Pa. St. 262, a message read: "Buy fifty (50) North Western, fifty (50) Prairie du Chien, limit forty-five (45)." There was a delay by the telegraph company in its delivery, resulting in a loss to the sender on account of the advance in price of Chicago & Northwestern Railway Company stock and the Milwaukee & Prairie du Chien Railway Company stock, which the message was intended to order purchased. The Supreme Court of Pennsylvania sustained a recovery, saying: "The dispatch was such as to disclose the nature of the business to which it related, and that loss might be very likely to occur if there was a want of promptitude in transmitting it, containing the order.

In *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421, the message was: "Send one hundred (100) Western Union. Answer price." The message, as delivered, read: "Send one thousand (1,000)," instead of "one hundred (100)." The message was intended as an order to sell 100 shares of stock in Western Union Telegraph Company. The agent, obeying the order as delivered, sold 1,000 shares of said stock, and to fill the order was compelled to buy 200 shares. We held that the plaintiff was entitled to

recover the difference between the price for which the shares of stock were sold and that which he was compelled to pay for those purchased. On the question as to the sufficiency of the dispatch to inform the agent of the transaction to which it referred so as to charge the telegraph company with resulting damages, the rule announced in *United States Telegraph Co. v. Wenger, supra*, was approved, and it was held that the dispatch disclosed the nature of the business as fully as the case demanded. On a second appeal—4 Ill. 168—by general language the decision is reaffirmed.

In *Telegraph Co. v. Griswold*, 27 Ohio St. 302, a dispatch read: "Will you give one fifty for twenty-five hundred at London? Answer at once as I have only till to-night." As delivered it read "one five" instead of "one fifty." As written, it was an inquiry whether the sender would pay \$1.50 in gold for 2,500 bushels of flax seed at London, Ontario, the parties having previously corresponded on the subject. The sendee replied to the dispatch as received, ordering the purchase, and recovered from the telegraph company the difference in price. On appeal to the Supreme Court, it was contended, as it is here, that the message was indefinite, and therefore the recovery below unauthorized. But the court said:

"It appeared upon its face that it related to a business transaction—a transaction involving the purchase and sale of property. The company was therefore apprized of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver a message in the language in which it was received."

In *Marr v. Western Union Telegraph Co.*, 85 Tenn. 530, a message was delivered to the company reading: "Buy one hundred shares Memphis and Charlestown." As delivered it read: "Buy one thousand shares, Memphis and Charlestown." "The recovery for consequential damages was sustained, the Supreme Court of that State saying: "This

message was so written that the slightest reflection would enable the operator, who understood its transmission, to see its commercial importance, and put him on his guard against error."

In *W. U. Tel. Co. v. Blanchard*, 68 Ga. 299, the message sent read: "Cover two hundred September, one hundred August." By an error in its transmission, as received it read "two hundred August" instead of "one hundred." As sent, it was an order to sell 100 bales of cotton for August delivery, and 200 for September delivery. The agent sold 200 bales for August, and plaintiff was compelled to buy 100 at a loss in order to meet the sale. A recovery for this loss was sustained by the Supreme Court of that State, in the following language: "As to the fifth ground in the request to charge, we do not see but what the message sought to be transmitted was, according to the proof, an ordinary commercial message, intelligible to those engaged in cotton dealing; and we can see no such special purpose intended by the sender, which was unknown to the company so as to vary the rule of liability. There was at least enough known to show it was a commercial message of value, and that is sufficient." See, also, *Squire v. Western Union Telegraph Co.*, 98 Mass. 232; *Pepper v. Western Union Telegraph Co.*, 4 Tenn. 660; Sutherland on Damages.

All the cases which hold that a telegraph company is not liable for consequential damages for a failure to transmit a dispatch as received, on the ground of indefiniteness or obscurity in the language of the message, do so upon the ground that unless the agent of the company may reasonably know from the message itself, or is informed by other means, that it relates to a matter of business importance, he cannot be supposed to have contemplated damages as a result from his failure to send it as written, as in the case of cipher dispatches. The Supreme Court of Wisconsin in *Candee v. Western Union Telegraph Co.*, 34 Wis. 472, say: "The operator who represents the company, and may for this purpose be said to be the other party to the contract, can

not be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damage will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling and unimportant character."

It is clear enough that, applying the rule in *Hadley v. Baxendale, supra*, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that, to one unacquainted with the meaning of the ciphers, it is wholly unintelligible and nonsensical. An operator would, therefore, be justifiable in saying it can contain no information of value as pertaining to a business transaction, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss. The messages in this case, however, are not cipher dispatches. Their language is plain and intelligible to every one who can read, so far as they purport to disclose the business to which they relate. They are abbreviations, and clearly indicate that they relate to business transactions between the sender and sendee. The first message, "Please buy, in addition to thousand August one thousand cheapest month," was notice to the agent at Chicago that appellee was ordering their agents in New York to purchase merchandise for them. We do not agree with counsel in saying that it might as well be construed to be an order "for a thousand toothpicks or a thousand papers of pins as anything else." Every one of intelligence knows that such articles are not purchased in that way. Suppose, however, that the agent was not informed as to the quantity, quality and value of the merchandise to be purchased by the message; would that justify him in contemplating, within the rule in the *Hadley Case, supra*, no damages as a result of his negligence or omission of duty in promptly and correctly sending it forward? It certainly cannot be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram, which are known to the parties themselves, to

make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility in the commercial world.

It is not easy to state a case in which it can be said the parties contemplated, at the time of contracting, all the damages which would probably result from a failure to perform the contract. We think the reasonable rule, and one well sustained by authority, is that where a message, as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused. Under this rule, both dispatches as presented to appellant's operator were sufficiently explicit to charge it with the loss sustained by appellees, resulting from what has been found by the jury to be its inexcusable mistakes.

* * * * *

Finding no reversible error in the record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

NOTE.—See INDEX to this and to prior volumes, title "Damages," also "Notes," sub-title "Damages."

For earlier Illinois cases pertaining to the duties and liabilities of telegraph companies, see note, vol. 2, p. 503, and the case to which it is appended.

DAVID H. ROGERS v. WESTERN UNION TELEGRAPH COMPANY.

Indiana Supreme Court, March 11, 1890.

(123 Ind. 395.)

PENAL TELEGRAPH STATUTE.—EXTRA-STATE MESSAGES.

The Indiana statute, R. S. 1881, sec. 4176, imposing a penalty for default of telegraph companies, does not apply to messages originating without the State.

Cases of this series cited in opinion: *Carnahan v. W. U. Tel. Co.*, vol. 1, p. 523; *W. U. Tel. Co. v. Reed*, vol. 1, p. 657.

APPEAL from judgment of Circuit Court, Ripley county, sustaining demurrer to complaint, in action for statutory penalty for failure to transmit a telegram. Facts stated in opinion.

John S. Scobcy, for appellant.

McDonald & Butler, for appellee.

COFFEY, J.: This was an action in the Circuit Court to recovery a statutory penalty (under Rev. St. Ind. 1881, sec. 4176), for failure to transmit and deliver a telegraphic message. The first paragraph of the complaint alleges that the appellant delivered to the appellee, at the city of Cleveland, in the State of Ohio, a telegraphic message, which the appellee, for the sum of fifty cents at the time paid by the appellant, agreed to transmit and deliver to the person to whom it was addressed at the city of Greensburgh, in the State of Indiana, and that the appellee wholly failed and neglected to transmit said message. The second paragraph of the complaint is the same as the first, except that it alleges that the appellant transmitted the message

to the city of Greensburgh, in the State of Indiana, but that it wholly failed and neglected to deliver the same to the party to whom it was sent. Each of these paragraphs sets out a statute of the State of Ohio, similar in its provisions to the statutes of this State, inflicting a penalty for failure to transmit telegraphic messages. A demurrer was sustained to each paragraph of the complaint, and appellant excepted. On failure of the appellant to plead further the court rendered judgment against him for the costs of the action. The assignment of errors calls in question the correctness of the ruling of the Circuit Court in sustaining the demurrer to the complaint. It is conceded by the appellant that it has been decided by this court that the courts of Indiana will not enforce the statutes of another State prescribing and inflicting penalties in cases like the one now under consideration. Under this admission, it is unnecessary to give any further attention to the statutes set out in the complaint.

It is contended, however, by the appellant, that, as the message was transmitted by the appellee to the city of Greensburgh, the failure to deliver it to the party to whom it was addressed was a violation of our statute, and entitles the appellant to the penalty thereby inflicted. This contention cannot be maintained, for the cases which hold that we will not enforce the penal statutes of another State also hold that there can be no recovery under our statute in cases like the one before us, where the contract was made in a foreign State. *Carnahan v. Telegraph Co.*, 89 Ind. 526; *Telegraph Co. v. Reed*, 96 Ind. 195. In the case of *Carnahan v. Telegraph Co.*, *supra*, it was said that, unless we adopt the view that the statute only applies to contracts made in this State, we shall be involved in endless difficulty. Any other rule would make the telegraph company amenable to different punishments for the same wrong; for it is quite clear that, if the wrong is punishable by the laws of the place where the contract is made, it would be no answer to a prosecution there to plead a judgment rendered by another forum, and

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under a different law. So, too, if we take a different view than the one indicated, we should be compelled to hold that the sender of the message from an office in Canada might come to our State and recover the penalty, although his sole contract with the corporation was made in a foreign country. In the case of *Telegraph Co. v. Reed, supra*, the message was transmitted from the State of Illinois to this State. By the negligence of the company's employees the message was changed in its transmission. As the contract for transmitting the message was made in the State of Illinois, it was held that our statute did not apply. We are of the opinion that the Circuit Court did not err in sustaining the demurrer to the complaint in this cause. Judgment affirmed.

NOTE.—See INDEX to this and previous volumes, title "Indiana Telegraph Statutes."

See note to *W. U. Tel. Co. v. Trumbell, post*.

WILLIAM REESE V. WESTERN UNION TELEGRAPH COMPANY.

Indiana Supreme Court, March 14, 1890.

(123 Ind. 294.)

DELAY OF TELEGRAM.—DAMAGES.—MENTAL DISTRESS.—EFFECT OF ONE TELEGRAPH STATUTE UPON ANOTHER.

The Indiana statute (Acts Ind. 1885, p. 151; Elliott's Sup. Rev. 1881, secs 1170-2; R. S. 1888, secs. 4176, 4176b), imposing a penalty upon telegraph companies for failure to transmit messages with impartiality and in good faith and without discrimination among patrons, does not, by virtue of the clause, "All laws and parts of laws inconsistent with this act are hereby repealed," repeal by implication the statute (Rev. St. 1881, sec. 4178), providing that "such companies shall deliver all dispatches, by a messenger, to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same; provided such persons or agents reside within one mile of the telegraphic station, or

within the city or town in which such station is." In an action for the statutory penalty the complaint must show that the addressee lived within the free delivery limit.

The sender of a telegram in the language "My wife is very ill; not expected to live," is entitled to recover damages for mental distress due to negligent failure of the company to transmit it for twenty days; the message showing upon its face that such distress would be a probable result of non-transmission.

Cases of this series cited in opinion: *Hadley v. W. U. Tel. Co.*, vol. 2, p. 542; *W. U. Tel. Co. v. Sheffield*, vol. 2, p. 802; *Manville v. W. U. Tel. Co.*, vol. 1, p. 93; *W. U. Tel. Co. v. Hamilton*, vol. 1, p. 181; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 786.

APPEAL by plaintiff below from judgment rendered at Circuit Court, Montgomery County.

Facts not stated in opinion are indicated in head-note.

M. E. Clodfelter and *J. A. Lindley*, for appellant.

J. E. McDonald, *J. M. Butler*, *A. H. Snow* and *A. J. Beveridge*, for appellee.

BERKSHIRE, J.: The complaint is in two paragraphs. The substance of the first paragraph is, that on the 27th day of February, 1887, the appellant delivered to the appellee's agent, at its office in Jamestown, Indiana, the following message:

"February, 21st, 1887. JAMESTOWN, Indiana.

"To *A. S. Clements*: "My wife is very ill, not expected to live.

"W. M. REESE."

and paid to the appellee the sum of 25 cents, the usual charge for the transmission of like messages to the city of Crawfordsville, and the full amount demanded for transmitting said message, and at the same time the appellant guaranteed the payment of all expenses incurred by the appellee in the delivery of said message to the person to whom it was addressed; that the appellee undertook and agreed to transmit and deliver said message promptly; that

the appellee acted in bad faith, and with partiality and discrimination, in that it did not transmit and deliver said message in the order of time in which it was received, but wilfully and purposely postponed the transmission of said message out of its order, for more than 20 days ; that after the transmission of said message from the appellee's office in Jamestown the appellee acted in bad faith, partiality and discrimination, in this : that it wilfully and purposely postponed the delivery of said message out of the order of time in which it was received, and did not deliver the same for more than 20 days after it was so received, and never did deliver it until called for by the said Clements, at the appellee's office in said city of Crawfordsville ; that during all the time the said message lay in the appellee's office in Crawfordsville the appellee transmitted messages for sundry and divers other persons, and knowingly, purposely and wilfully gave preference to others, and to the delivery of messages to others ; that the said messages so transmitted to the said sundry and divers persons did not contain intelligence of general or public interest, and were not communications for or from officers of justice ; that the said Clements then had business rooms rented in said city of Crawfordsville and was preparing to go into business only a few doors from appellee's office ; that he had a post-office box rented in the post-office of said city, through which he received his mail during the time the said message lay in the appellee's said office, (the said post-office being but a few doors therefrom) ; that the said Clements was well known to the postmaster and the employees in said post-office ; that it was the appellee's custom to deliver messages promptly anywhere within five miles of said city, payment of charges being first guaranteed.

Then follows a demand for \$100, the statutory penalty, which it is claimed the appellant is entitled to recover.

The second paragraph rests upon a breach of duty because of a failure to deliver the message. It is averred that, when the contract to send and deliver the message was made with the appellee, the appellant's wife was dangerously ill, in

fact, at the point of death ; that the said A. S. Clements, to whom the telegram was sent, was a brother-in-law of this appellant, having married his sister, and the families were on the most intimate terms of friendship ; that appellant greatly desired the prompt delivery of said message, and relied on and expected that the same would be promptly transmitted and delivered in accordance with the agreement stated ; that the appellee and its agents were fully informed of said facts, and well knew the importance of immediate delivery at the time it received the message and the said guarantee.

It is averred that the said Clements resided during said time not less than one, nor more than two, miles from said city of Crawfordsville ; received his mail at the post-office in said city, and had a box in said office through which he received his mail ; that he had resided in and within said city for several years before said date, and was well known in said city ; that he had then arranged to engage in business there ; that the wife of the appellant died in a few days after the said message was transmitted ; that if said message had been promptly delivered the said Clements and wife would have been present during the last sickness of appellant's wife, and in time to have conversed with her before her death, and been present until her death and burial ; that by reason of their absence, and of the great desire the appellant's wife had expressed to see them before her death, the appellant suffered great uneasiness, anguish, and anxiety of mind.

The court at first overruled a demurrer to each of the paragraphs, and the appellee filed an answer in three paragraphs, the first of which was a general denial. The second paragraph applied to the first paragraph of the complaint, and the third paragraph to the second paragraph of the complaint.

The court having afterwards sustained the demurrer to the first paragraph of the complaint, this carried out of the record the second paragraph of answer.

The appellant demurred to the third paragraph of answer,

which the court overruled, and he saved an exception ; he then filed a reply in general denial.

The issues joined were then submitted to the court without a jury, and, after hearing the evidence, a finding was made for the appellant, assessing his damages at 50 cents. The appellee then moved for a judgment against the plaintiff for costs. This motion was sustained, to which ruling the appellant reserved an exception. The court then rendered a judgment against the appellee for 50 cents, and against the appellant for costs.

At the time the court reversed its ruling, and sustained the demurrer to the first paragraph of the complaint, the appellant saved an exception.

The errors assigned are that the court erred in sustaining the demurrer to the first paragraph of the complaint, in overruling the demurrer to the third paragraph of answer, and in sustaining the motion of the appellee for a judgment against the appellant for costs.

There is not much to be said in reference to the demurrer to the first paragraph of the complaint. We are of the opinion that the averments in the said paragraph did not make a case within sections 1120 and 1122, Elliott's Supp. (Acts of 1885, p. 151) when construed with section 4178, R. S., 1881, and the three sections must be construed together.

It is claimed that the act of 1885 repealed by implication said section 4178. We do not think so ; the repealing clause only repeals such laws as are in conflict with the said act. In its scope it does not cover the subject-matter to which said section 4178 relates. There is nothing in the act of 1885 regulating the distance or prescribing the limits within which telegraph companies shall deliver messages. Repeals by implication are not favored, and, if a reasonable construction can be found which will enable both the old and the new laws to stand that construction will be applied. *Bush v. Board, &c.*, 121 Ind. 420.

It is not alleged that the person to whom the telegram was addressed resided in or within one mile of the city of Crawfordsville.

Penal statutes are to have a strict construction, and, to recover a penalty, the facts stated in the pleading must clearly show a right to the penalty claimed, notwithstanding such strict construction. *Hadley v. Western Union Tel. Co.*, 115 Ind. 191.

The third paragraph of the answer was pleaded as a partial answer, but it was in bar of all damages except nominal damages.

This paragraph, in substance, is that the appellee was not informed, when it undertook to send the message, by what appeared upon the face of it or otherwise, that the appellant would suffer pecuniary loss, or be damaged because of mental suffering, in case of a failure to deliver the message.

We think the answer was bad, and that the demurrer should have been sustained.

The second paragraph of complaint showed a good cause of action, and the court so held. Under it the appellant was entitled to more than nominal damages, and more than the sum of 50 cents, which the court allowed. If the facts alleged in the complaint were true, the appellant was entitled to substantial damages, and the facts set up in the answer did not avoid the appellant's right to recover substantial damages, under the allegations of the second paragraph of the complaint. The message was one of more than ordinary importance. Of its important character, the agents of the company at J. m. stown and Crawfordsville had knowledge, for the reason that this information appeared on the face of the telegram. It was a message which denoted urgency for its delivery to the person to whom addressed, and of this fact the appellee had notice, and contracted with reference to it. It therefore became the duty of the appellee to make prompt and reasonable effort to deliver the message to the person to whom it was addressed, and especially so, as the expense of delivery was guaranteed in advance. This obligation the appellee wholly and entirely failed to perform, and in such failure was guilty of negligence.

Although the telegram had no relation to any business

transaction which would have involved dollars and cents, this did not justify the appellee in neglecting its duty.

It had undertaken, for a valuable consideration, to deliver the message promptly, and its failure to do so, or to make reasonable effort in that direction, was negligence, and a violation of its undertaking.

The diligence which a telegraph company is required to use in the delivery of a message will be determined, to some extent, from the character and importance of the message.

Upon humane grounds, messages like the one here involved should be promptly delivered, and should be regarded as of more importance to the parties concerned than mere business messages, and in promptness of delivery should have the preference over messages of the latter class.

It is true there was nothing in the telegram to indicate the kinship that existed between the appellant and the person to whom the message was addressed ; nor did it request the presence of Mr. Clements, or his wife, at the bedside of the dangerously sick sister-in-law ; but this affords no excuse to the appellee for its failure to deliver the telegram. The appellee was bound to know that the message pertained in some way to the serious illness of the appellant's wife, and therefore that prompt communication with the person to whom the message was addressed was much desired, and especially so in view of the additional fact that the appellant undertook to communicate by a telegraphic dispatch.

From the information at hand, when it entered into the undertaking, the appellee was bound to know that mental anguish might, and most probably would, come to some person in case it failed to act promptly in transmitting and delivering the dispatch, and therefore such a result was contemplated when the message was delivered by the appellant to the appellee's agent at Jamestown, and is within the undertaking.

Whether such mental suffering would be caused by the

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failure of a brother-in-law and his wife to go at once to the bedside of a dying sister-in-law, or from the failure of a physician to reach his patient while there was still hope that something might be done to bring relief, and possibly a restoration of health, or for some other cause, is unimportant. It was not the particular cause, but the effect which might be produced, that was contemplated by the parties, and which is to be looked to in determining the question of liability.

In *Western Union Telegraph Co. v. Sheffield*, 71 Tex. 570, a telegram in the following language was delivered to the company's operator to be forwarded: "You had better come and attend to your business at once." The court said that the message indicated with reasonable certainty to the telegraph operator the following facts: "[1.] That the plaintiffs had a claim of some pecuniary nature [2.] That the claim should be attended to at Jefferson (from whence the telegram was sent). [3.] That the matter was urgent, 'at once.' [4.] Loss would probably follow the want of such attention, which might be prevented by obeying the call made in the dispatch. This was sufficient to disclose that the object was to enable the plaintiffs to attend to a claim due them, and that loss might result from a failure to transmit the message with promptness."

In *Hadley v. Western Union Tel. Co.*, 115 Ind. 200, the court said, by NIBLACK, J., with reference to the following telegram:

"NORTH SALEM, Ind., Oct. 14th, 1886.

To Henry Hadley, Danville, Indiana: Want your cattle in the morning.
Meet me at your pasture.

S. C. CLAY."

"In this case the terms or contents of the dispatch sent by Clay to Hadley fairly indicated the necessity of its prompt delivery, as well as transmission, and were such as to authorize the inference that a delay until the day following would result in confusion, and possibly, if not probable, injury to one or both parties to the dispatch."

In *Manville v. Western Union Tel. Co.*, 37 Iowa, 214,

MILLER, J., said : "The message was, 'Ship your hogs at once.' The obvious reason of this is evident on its face. It clearly imports that, to meet a good market, the hogs must be shipped promptly, and that by delay a good market will be lost. It is equivalent to saying, if you ship at once, you will obtain gains on the purchase and sale of your hogs. If you delay, these gains will be lost by the market price declining. It is most obvious, therefore, that the parties contemplated this very thing."

As we have already said, the message clearly indicated its importance, and the urgency for its prompt delivery. There were no pecuniary benefits contemplated as the result of the telegram, as it had no reference to any business transaction, and therefore pecuniary loss, because of its non-delivery, was not within the appellee's undertaking. But the appellant having suffered great mental anguish, because (as he alleges) of the failure to promptly deliver the message, it would be a harsh rule which would deny to him all redress, except the mere pittance which he paid to have the telegram transmitted and delivered.

Some of the authorities seek to draw a distinction, as to the right to recover damages for mental suffering, between cases where there may be a recovery for pecuniary loss and cases where there is or can be no pecuniary loss, to which class the present action belongs.

With this distinction we have no sympathy, and confess that we can see no good reason for it to rest upon. If a telegraph company undertakes to transmit and deliver promptly a message wherein dollars and cents are alone involved, and its negligence occasions loss, it is conceded by all the authorities that it may be compelled to respond in damages. Why? Because it has negligently broken its engagement, or, as is sometimes said, failed to perform a duty which it owed to the sender of the message, or the person to whom it is addressed, as the case may be.

For the same pecuniary consideration it undertakes to transmit and deliver a message informing a husband of the

dangerous illness of his wife, the wife of the serious sickness of her husband, the parent of the child, the child of the parent, and it negligently fails to deliver the telegram, and as the result the sick relative dies without having the comforting presence of the husband, wife, father, mother, son or daughter, with all the benefits, physical and mental, which would follow therefrom. Is it to be said that, under such circumstances, the most that the telegraph company is liable for is nominal damages, because of the great mental anguish suffered by the sender of the telegram, who may be the father, mother, husband, wife or child? In our judgment, no such rule can or should prevail.

In failing to promptly deliver the telegram, the telegraph company negligently fails to perform a duty which it owes to the sender of the telegram, and should be held liable for whatever injury follows as the proximate result of its negligent conduct.

It is not a mere breach of contract, but a failure to perform a duty which rests upon it as the servant of the people. In our opinion, upon the facts stated in the second paragraph of the complaint, the appellant is entitled to recover damages for the mental suffering which he endured, and his measure of damages is the amount paid for the transmission of the message, and in addition, what would seem to be just as a compensation for his mental anguish.

We have examined the case of *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181. That was an action to recover a statutory penalty, and what is said as to measure of damages in an action like the one under consideration is a mere dictum, as no such question was before the court. See *Western Union Tel. Co. v. Cooper*, 71 Tex. 507 (10 Am. St. Rep. 772, and note). *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695 (6 Am. St. Rep. 864, and note); *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

Judgment reversed, with costs; court below directed to proceed according to this opinion.

Petition for a rehearing overruled April 12, 1890.

NOTE.—This case is cited in the following cases *post*; *Crawson v. W. U. Tel. Co.*; *Young v. W. U. Tel. Co.*

See INDEX to this and previous volumes, titles "Damages," "Indians Telegraph Statutes;" also "Notes," sub-titles "Damages," "Indians Statutes."

See note to *W. U. Tel. Co. v. Trumbell*, *post*.

WESTERN UNION TELEGRAPH COMPANY v. TRUMBELL.

Indiana Appellate Court, April 14, 1891.

(1 Ind. App. 121.)

PENAL STATUTE OF 1885.—LIMITING TIME.—PLEADING.

Where a telegraph blank contained the following stipulation: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," the sixty days begin to run from the time of actual transmission.

Such a stipulation has no proper application where an action for the recovery of damages is commenced within the sixty days.

The question of sufficiency of a complaint to meet the requirement of the Indiana Telegraph Statute of 1885, that the statutory penalty cannot be recovered in case of mere negligence, cannot be raised for the first time in an appellate court.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Yopst*, vol. 2, p. 553; *W. U. Tel. Co. v. Jones*, vol. 2, p. 553; *W. U. Tel. Co. v. Meredith*, vol. 1, p. 643; *W. U. Tel. Co. v. Wilson*, vol. 2, p. 519; *W. U. Tel. Co. v. Seirele*, vol. 1, p. 788.

APPEAL by defendant below from judgment of Circuit Court, Starke county. Facts stated in opinion.

J. E. McDonald, J. M. Butler, A. H. Snow and *A. J. Beveridge*, for appellant.

BLACK, C. J.: The appellant questions in this court, for the first time, the sufficiency of a complaint to recover the penalty prescribed by the act of April 8, 1885 (Acts of

1885, p. 151), for violation of the provisions of that act in the transmission of a telegraphic message.

The complaint alleges, among other things, that the appellee placed the message in the hands of the appellant's agent, at the appellant's office in the town of Knox, in Starke county, at 5 o'clock and 30 minutes in the afternoon of the 10th day of April, 1888, during the appellant's office hours, and paid the appellant in advance the sum of twenty-five cents for transmission of the message, which the appellant took and accepted, and undertook and agreed to transmit without delay, with impartiality and good faith, and in the order of time in which it was received; and that the amount received by the appellant as aforesaid was the full amount demanded by the appellant for the transmission of said message.

The only portions of the complaint to which objection has been made by the appellant are the following subsequent allegations:

"And that said defendant held said dispatch in its said office, at the town of Knox aforesaid, and after the aforesaid agreement had been made, and the pay for transmission had been received, as aforesaid, for the time of eighteen hours, and did not transmit the said dispatch till about 12 o'clock M. of April 11th, 1888, and did not transmit said dispatch in order of time in which it was received, and with impartiality and good faith, and without delay, and in the order of time in which it was received."

It is required by the statute of 1885 that the telegraph company, during the usual office hours, shall receive dispatches, whether from other telegraph lines or other companies or individuals, and shall, upon the usual terms, transmit the same "with impartiality and in good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, or words or figures charged for, or manner or conditions of service, between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality;" and that any person or company violating any of

the provisions of this act shall be liable to the penalty prescribed.

The appellant, referring to the portion of the complaint above quoted, claims that, stripped of conclusions of law, the pleading contains merely a statement of the delay of the message.

Without intending to hold that the penalty provided for in this statute can be recovered for the mere negligence in the transmission of a telegraphic dispatch, we are of opinion that the complaint is not open to objection proposed for the first time in this court.

There was a general denial and an affirmative answer.

An assignment of error is based upon the overruling of a demurrer to a reply to the affirmative answer. It is a familiar rule that a bad reply is good enough for a bad answer; and, if we find that the affirmative answer was insufficient, we need not examine the reply. *Ætna Ins. Co. v. Baker*, 71 Ind. 102; *Wilhite v. Hamrick*, 92 Ind. 594; *Scheible v. Slagle*, 89 Ind. 323 (326); *Western Union Tel. Co. v. Yopst*, 118 Ind. 248 (259).

The answer sets out the contract contained in the usual message blank upon which the dispatch in question was written, and relies upon the failure of the appellee to present her claim as stipulated in the following requirement in said contract:

The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

There is abundant authority for holding that such a stipulation is reasonable, valid and binding upon the sender of a message who seeks to recover the statutory penalty. *Western Union Tel. Co. v. Jones*, 95 Ind. 228; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93; *Western Union Tel. Co. v. Wilson*, 108 Ind. 308; *Western Union Tel. Co. v. Yopst*, *supra*; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83 (Allen Tel. Cas. 463); Gray Com. by Tel., sections 34, 35.

In *Tel. Co. v. Yopst, supra*, it was held that such a provision in the contract does not apply where there is no transmission of the message.

The answer before does not directly allege or deny that the message in question was transmitted, but it refers to the transmission by mention of "the party sending the message," and by alleging that the appellee did not present her claim "within sixty days after sending the message." It shows that the message was dated April 10, 1888, and that it was received by the appellant on that day for transmission. The complaint, as already shown, alleged the delivery of the message to the appellant at five o'clock and 30 minutes in the afternoon of the 10th of April, 1888, and that the appellant held it for eighteen hours, and did not transmit it until about noon on the 11th of April, 1888, and did not transmit it in the order of time in which it was received, etc.

If it be regarded that it sufficiently appears that the dispatch was sent, it distinctly appears that it was not sent sooner than the 11th of April, 1888.

This action was commenced on the 5th of June, 1888; therefore the period of "sixty days after sending the message" had not elapsed when this action was commenced.

Will the failure of the sender of a message, who has become a party to such a contract, to present his claim within sixty days after sending the message, bar his action for the penalty commenced before the expiration of that period?

In *Western Union Tel. Co. v. Yopst, supra*, it was said of such a stipulation: "The limitation is for the benefit of the company, and is of its own creation. It has no right, therefore, to ask that the contract be extended for its own benefit beyond the letter of the instrument."

The contract is to be enforced according to its terms, construed so as to apply what may be regarded reasonably as the intention of the parties. The duty imposed by the law can not be evaded by contract. The company can not contract against its liability for violation of its duty prescribed

by the statute ; and in the stipulation in question there is no attempt to do so. It provides that, if a violation of duty occur, the company will not be liable for damages to which the other party thereby becomes entitled, in a case where the claim is not presented in writing within sixty days after sending the message.

It may be supposed that by inserting the stipulation in the contract the company intended to prescribe a limit for the presentation of the claim which would enable it to investigate the case while the facts were yet new and ascertainable by it, and which would be treated by the courts as reasonable for such a purpose.

The appellee's right of action was not founded upon the presentation of a written claim ; it was based on a breach of statutory duty. The appellee was not bound to allege as a part of her cause of action that she had presented a written claim.

As against the company, when a violation of duty has occurred, the liability for the penalty has accrued immediately. The right to recover it may be lost by failure to present a claim in writing within a period of sixty days after sending the message.

The contract does not supersede the statute of limitations. It does not prescribe a period beyond which an action may not be brought. Nor does it attempt to require the lapse of any period or the performance of any act before a right of action shall accrue or a suit shall be commenced.

When the failure to present the claim, as provided in the contract, may be made available as a defense, it can not be proved under the general denial, but, being an affirmative defense, it must be specially pleaded. *Western Union Tel. Co. v. Scircle*, 103 Ind. 227. It is to be pleaded, not in abatement, or in bar of the further maintenance of the action, but in bar of the action generally.

The answer must relate to the time of the commencement of the action ; otherwise it would not be a complete bar.

At the commencement of this action the appellee still

had a number of days within which, by the presentation of her claim, she could have provided against a defense, based on this stipulation, to an action commenced at any time after the sixty days, and within the statutory limitation of such an action.

It could not be said, having relation to the time of the commencement of this action, that for the period of time allowed by the contract the appellee had failed to present her claim in writing.

In a note to *Wolf v. Western Union Tel. Co.*, *supra*, in Allen Tel. Cas., the editor, on page 469, says: "It will be observed, in this case, that the date of the message was October 23, 1866; and that the action was brought December 13, 1866, fifty-one days afterwards. It was not proved that any written claim for damages was presented in any other form than by bringing the action; but the question whether the bringing of the action would of itself amount to a presentation of a claim in writing for damages was not adverted to, either by counsel or by the court. The case for the plaintiffs was put upon the ground that the plaintiffs were not bound by the condition. It was not urged that they had complied with the condition. The purpose of this requirement seems to have been simply to enable the company to know seasonably what claims are to be pressed against them. In ordinary cases, where a promissory note is payable on demand, the bringing of an action is a sufficient demand. So, in an action against a telegraph company to recover damages for negligence in respect to a message, ordinarily no special demand need be proved. If any special demand were necessary, by common law, clearly such demand need not be in writing. The requirement in this case, however, calls for a written demand; and as the company seek to impose on the plaintiffs a duty not resting upon them by common law, the condition should not be extended beyond its reasonable import by construction. There is nothing in its terms requiring that a claim in writing shall be presented before

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action brought. * * * It is worthy of consideration whether the plaintiffs' action might not have been supported upon the ground that the bringing of it within the sixty days amounted to a compliance with the provision."

In *Gray on Communication by Telegraph*, in a note to section 35, the author refers to *Wolf v. Western Union Tel. Co.*, *supra*, and to Mr. Allen's note, and says that the bringing of the action within the time provided for the presentation of the claim, "it seems, substantially complied with the stipulation, the object of which was to put the company, in a reasonable time, in possession of accurate information of the breach of the contract in case a breach of it occurred."

Perhaps it is well enough to say, not that the commencement of the action within the sixty days is a compliance with the provision of the contract, but rather that in such a case the stipulation in question can have no proper application, and, therefore, does not affect the rights of the parties. If these views are correct, the second paragraph of the answer was insufficient.

There was a motion for a new trial, assigning that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law.

We have read the evidence, and, holding to the opinion expressed herein concerning the answer, we are unable to say that there was error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

NOTE.—In *W. U. Tel. Co. v. Emanuel Griffin*, Indiana Appellate Court, April 2, 1891 (1 Ind. App. 46), a complaint containing the direct averment that the message was not sent in the order of time in which it was received, was held sufficient, since it alleged not mere neglect of duty, but also a discrimination. "Such discrimination, although it consists in the omission to discharge a duty imposed by the statute, is an aggressive violation of that duty, is in bad faith, and not impartial."

Also held that a complaint in such a case, which stated that the telegram was addressed to a physician, notified him of the illness of the send-

er's daughter and summoned him to attend her, showed sufficient necessity to warrant sending it on Sunday.

The foregoing three cases represent the State of Indiana in this volume, in respect to the duties of telegraph companies as carriers of dispatches, and to the statutes regulating them.

For earlier Indiana cases upon said subject, see INDEX to vols. 1 and 2, title "Indiana."

A. M. GARRETT, Appellant, v. WESTERN UNION TELEGRAPH COMPANY, Appellee.

Iowa Supreme Court, June 3, 1891.

(88 Iowa, 257.)

FAILURE TO TRANSMIT TELEGRAM.—LIMITING LIABILITY.—DAMAGES.

A telegraph company cannot by stipulation protect itself against the consequences of its own negligence. Hence, a condition printed in a "night message" telegraph blank, limiting the liability of the company for errors, delays or non-delivery of such messages, to a sum equal to ten times the sum paid for transmission, will not excuse the company in case it made no attempt to send the message at all.

A message delivered by a cattle buyer on his way to Kansas City, to a telegraph company to be sent to his agent at Chicago, read as follows: "Send me market Kansas City, to-morrow and next day." Plaintiff had an arrangement with his agents to send no answer to such a dispatch unless there was a change in the market since their last report. Receiving no answer to said telegram, and therefore believing there was no change in the Chicago market, he bought cattle at Kansas City. Prices had in fact declined. Held, a proper question for the jury to decide whether the plaintiff's damages were such as might reasonably have been apprehended to result from defendant's failure to transmit the telegram.

If the message was not transmitted, and the plaintiff acted upon the fact that he received no reply thereto, he would be entitled to recover such damages as he sustained by purchasing the cattle in the belief that his message had been transmitted.

It appearing that the prices of cattle in the Chicago market on the day in question were posted in the Kansas City Stock Exchange, so that the plaintiff might there have learned of the decline in price, still held, that

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it was a question for the jury to decide whether or not the plaintiff acted prudently in relying on his telegram in connection with his arrangement with his agent, the addressee.

Cases of this series cited in opinion: *Tel. Co. v. Griswold*, vol. 1, p. 329; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14; *W. U. Tel. Co. v. Fontaine*, vol. 1, p. 229; *Hibbard v. W. U. Tel. Co.*, vol. 1, p. 63; *Manville v. W. U. Tel. Co.*, vol. 1, p. 93; *W. U. Tel. Co. v. Hall*, vol. 2, p. 868; *Turner v. Hawkeys Tel. Co.*, vol. 1, p. 208.

ACTION for damages for failure to deliver a telegram. Appeal by plaintiff from judgment in his favor for sixty cents, upon the verdict of a jury. Facts stated in opinion.

R. Caldwell and *L. A. Riley*, for appellant.

Arthur Springer, for appellee.

ROTHROCK, J.: I. The evidence in the case shows that the defendant is a resident of Louisa county, and that at the time of the wrongs complained of by him, and for some time before that, he had been in the business of buying and shipping live stock to the Chicago market. His operations were not confined to his immediate neighborhood, but he bought and shipped on the Rock Island railroad, at points between Muscatine, Iowa, and Kansas City, Missouri, and including those places. On the evening of the 28th of June, 1888, he left his home in the country, and went to Columbus Junction, on the Chicago, Rock Island & Pacific Railway, and took passage for Kansas City. Before leaving Columbus Junction, he wrote and delivered to the operator of the defendant at that station a message, of which the following is a copy:

"June 28, 1888.

"*To Gregory, Cooley & Co., U. S. Yards, Chicago:*

"Send me market Kansas City, to-morrow and next day.

"A. M. GARRETT."

When he delivered the message to the operator he gave fifty cents in payment for its transmission. The plaintiff

arrived in Kansas City about nine o'clock the next morning, and went to the stock yards for the purpose of buying cattle. He went to the telegraph office in the stock exchange building several times, gave his name, and inquired for an answer to the message which he had sent the night before. He made these inquiries until two o'clock in the afternoon, and he then went into the stock yards and bought one hundred and forty-seven cattle. At the time of his purchase the price of cattle in Chicago was fifty cents per hundred less than it was on the day before the plaintiff delivered the message to the defendant's agent at Columbus Junction. It appears in evidence that Gregory, Cooley & Co., to whom the message was addressed, was the commission firm which received, handled and sold the shipments of cattle made by the plaintiff, and had done so for several years, and the evidence shows that there was a business arrangement between the plaintiff and Gregory, Cooley & Co., by which they were to keep him advised by telegraph of the cattle market in Chicago. This arrangement was as follows: If the plaintiff asked Gregory, Cooley & Co. for the state of the market by telegraph, and there was no change from the last report, no answer to the telegram was received, and the plaintiff acted upon the last report. If there was a change, then Gregory, Cooley & Co. answered the telegram of the plaintiff, by giving him the advance or decline on the previous report. There is evidence tending to show that there was a report made by said commission firm to plaintiff on the twenty-seventh day of June, 1888, and that the plaintiff bought the cattle at Kansas City relying on that last report, and that, if his message had been sent, delivered and answered, he would not have made the purchase. The evidence tends quite strongly to show that the message was not sent from Columbus Junction, and that it was on a hook in the office, and that no attempt was made by the operator to transmit it to Gregory, Cooley & Co. It is true there is some conflict in the evidence on this question, but, as it was material to the rights of the parties, it was a proper question to be submitted to the jury. It is

shown, without conflict, that the message was not at any time delivered to Gregory, Cooley & Co. There is evidence to the effect that the Chicago market for cattle was posted on the bulletin boards at the stock exchange in Kansas City, and that, if the plaintiff had consulted these reports, he would have been advised of the decline in the market before he made his purchase; and two of the members of the firm of Gregory, Cooley & Co. testified on the trial as witnesses that, if the plaintiff's message had been received by them, they would have immediately answered it, and advised the plaintiff of the decline in the market.

At the close of the introduction of the evidence, the court instructed the jury that, under the pleadings and evidence, there could be no recovery by the plaintiff except for the sum paid by him for sending the message, and interest thereon at six per cent. Under this instruction the jury returned a verdict for sixty cents. There is nothing in the record showing upon what ground the jury were instructed that the plaintiff could not recover damages. The message which the plaintiff delivered to the operator is what is known as a "night message." It was written upon a blank furnished by the defendant. There was printed matter on the blank, and, among other words thereon, there was the following:

"The Western Union Telegraph Company will receive messages to be sent, without repetition, during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates; but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such message, happening from any cause, beyond a sum equal to ten times the sum paid for transmission; and that no claim for damages shall be paid unless presented in writing within thirty days after sending the message."

Whatever right the defendant may have, if any, to limit its liability, or provide against the negligence of its agents in the transmission of messages, there can be no question

that the language above quoted can not be held to excuse the defendant for a failure to send the message, or to make the attempt to do so. The exemption provided for by the printed blank was for errors or delays, or non-delivery to the person to whom it was addressed, and not for a failure to make an attempt to send it. But suppose it be conceded that an attempt was made to send the message. The evidence shows without conflict that it was not at any time delivered; and the defendant fails to show that any effort was made to deliver it to Gregory, Cooley & Co. In this state of the evidence, the restriction as to the liability of the defendant is no defense to the action, for the reason that the defendant can not by contract limit its liability for the plain and palpable negligence of its operators and agents. The defendant can not contract against its own negligence. This rule was announced by this court in *Sweatland v. Telegraph Co.*, 27 Iowa, 433; and we think it is now the settled law of this country. *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Tyler v. Telegraph Co.*, 60 Ill. 421; *Wolf v. Telegraph Co.*, 62 Pa. St. 83; *United States Tel. Co. v. Gildersleve*, 29 Md. 232; *Ellis v. Telegraph Co.*, 13 Allen, 226; *Parks v. Telegraph Co.*, 13 Cal. 422; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Hibbard v. Telegraph Co.*, 33 Wis. 558; *Manville v. Telegraph Co.*, 37 Iowa, 214. These and a large number of other cases which might be cited sustain this doctrine. It appears to us that the rule is eminently just. The contrary doctrine would, in effect, enable telegraph companies to undertake the transmission of messages, and by the same contract exonerate themselves from all liability for failure to perform the service by reason of the carelessness or negligence of their agents or operators in failing to attempt to perform the service. It would be a marvelous doctrine to hold in this case that the defendant could fail to attempt to send the message as it contracted to do, and exonerate itself by paying back to the plaintiff the nominal sum it received for the service. If its liability is to be measured by that standard, its contract is a sham and a

deception. It could perform or not perform, at its pleasure, and escape all liability for the consequences of non-performance.

II. The next question arising on the record is whether the form of the message was such as that the defendant can be properly chargeable with the alleged damages incurred by the plaintiff. It has often been said that a party who fails to perform a contract is liable for such damages as the parties to the contract may fairly and reasonably have apprehended would result from a breach. This does not mean that the parties to the contract contemplated the exact results. It is enough if it may fairly be found from the language of the contract, and the circumstances which were within the personal knowledge of the parties, that there might be serious consequences attending a breach of the contract. The message involved in this case did not apprise the defendant's agent at Columbus Junction by its terms, that the plaintiff was on his way to Kansas City to purchase cattle, and that he would rely on the answer to the message in making his purchases. But it did in effect advise the agent that he was on his way to Kansas City, and that he desired market reports to be sent to him at that place. The evidence shows that the plaintiff had sent and received a great many messages from that office. We think it was, to say the least, a proper question to submit to the jury to determine whether, in view of all the facts and circumstances surrounding the parties, the defendant ought to be charged with knowledge that the plaintiff intended to act upon the result of his message in buying or selling cattle, and that it pertained to transactions which might involve loss ; and, as it appeared that by the arrangement between the plaintiff and Gregory, Cooley & Co., that no answer to the message was equivalent to an answer that the market was unchanged, the question of substantial damages should have been submitted to the jury.

III. The next question properly to be considered is whether the plaintiff, if he acted upon the fact that he received no message as equivalent to an answer that the

market was unchanged, was entitled to have the jury consider whether he was damaged in a substantial manner. In other words, were the damages he claims the direct result of the defendant's failure to perform its contract, or were they remote and speculative? In the case of *Western Union Tel. Co. v. Hall*, 124 U. S. 444 (8 Sup. Ct. Rep. 577), it appeared that Hall sent a message to his agent instructing him to buy for him ten thousand barrels of petroleum. Petroleum was at that time selling for one dollar and seventeen cents per barrel, and the evidence showed that the agent would have bought at that price; but the telegram was delayed through the negligence of the telegraph company, and the price had advanced to one dollar and thirty-five cents per barrel when the message was actually received by the agent, and he did not buy. It was held that Hall could not recover the difference in the price of the oil, because he suffered no actual loss, and was entitled to nominal damages only. But that was unlike the case at bar. Here the jury should have been directed to determine whether the plaintiff acted upon his advices from the commission men, or, rather, the absence of a message from them, and, if he so acted and made a purchase, his loss was direct and proximate, and not remote and speculative. In the cited case it is said: "Where the negligence of the telegraph company consists, not in delaying the transmission of a message, but in transmitting it erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual losses, based upon changes of market value, are clearly within the rule for estimating damages." See, also, *Turner v. Telegraph Co.*, 41 Iowa, 458. Under this rule, if the defendant's agent at Columbus Junction did not transmit the message, and the plaintiff acted upon the fact that he received no reply thereto, he would be entitled to recover such damages as he sustained by purchasing the cattle in the belief that his message had been transmitted.

IV. It is urged in argument that the plaintiff should have protected himself by ascertaining the market value of cattle

in Chicago before his purchase at Kansas City. This was a question for the jury. It was not a question of law to be determined by the court. If that feature of the case had been submitted to the jury, and it had been found that the plaintiff, as a reasonably prudent man, ought not to have acted upon the message which he sent to Gregory, Cooley & Co., and his arrangement with them in reference to their correspondence by telegraph, then there can be no recovery. But the court submitted no question to the jury, and, for the reasons above pointed out, we think such a disposition of the case should have been made. Reversed.

NOTE.—For earlier Iowa cases upon telegraph companies in their relations to the public, see note, vol. 2, p. 574.

See INDEX to this and to previous volumes, titles "Limiting Liability," "Damages;" also "Notes" upon said subjects.

THE WESTERN UNION TELEGRAPH COMPANY V. IRA F.
COLLINS ET AL.

Kansas Supreme Court, July, 1890.

(45 Kan. 88.)

FAILURE TO SEND TELEGRAM.—DAMAGES.—EVIDENCE.

By failure of a telegraph company to transmit a telegram quoting the price of hogs at his nearest market, the plaintiff was caused to ship to the next nearest market town, and sell at a lower figure. Held, that the measure of his damages in an action against the company was the difference in price plus the increased cost of transportation.

The proper foundation for the admission of a copy of a telegram at a trial held fourteen months after its presentation for transmission, is laid by proving by the manager of the company at the receiving office that the original telegram is not in his office nor under his control, and also showing a rule of the company requiring the destruction of all telegrams after six months.

Where the language of a telegram is intelligible to the addressee but somewhat ambiguous to persons not engaged in his line of business, it may be explained by the person who sent it.

Where a written demand for damages has been served upon an agent of a telegraph company, who keeps the copy and admits service in writing upon the original, the loss of the original being established, its contents may be proven by parol.

ERROR from Atchison District Court. The facts are fully stated in the opinion.

Waggener, Martin & Orr, for plaintiff in error.

J. F. Thompson and Smith & Solomon, for defendants in error.

Opinion by STRANG, C.: Action for damages for failing to deliver a certain telegraphic message. The facts are as follows :

The plaintiff in error was a telegraph company, doing business between St. Joseph, Missouri, and Sabetha, Kansas. The defendants in error were partners, doing business at the latter place, and engaged in shipping hogs. They had purchased of the farmers in the neighborhood of Sabetha a lot of hogs, which they designed shipping to market, either at St. Joseph or Kansas City. The hogs were to be delivered at Sabetha by the farmers on the 12th of January, 1885. Prior to that date the defendants had employed one E. P. Roher, a live stock commission merchant or broker, at St. Joseph, to send them a dispatch from that point on the 12th, informing them of the condition of the hog market at that place on that day. Roher delivered a message containing the desired information, addressed to the defendants at Sabetha, to the plaintiff company at its office in St. Joseph, in time to have reached the defendants, so that they might have shipped their hogs to St. Joseph. But the message was never transmitted, or, at least, never delivered to the defendants, although they called for it at the company's office at Sabetha four times on that day. Not hearing from Roher, and supposing on that account that the market was not good at that point, the defendants shipped their hogs to Kansas City, where

they were sold at an average price of \$4.20 per hundred. Subsequently the defendants learned that if they had shipped to St. Joseph on that day they would have received \$4.30 per hundred for their hogs, and saved the freight from St. Joseph to Kansas City; and that, therefore, they had suffered a loss of ten cents per hundred on the gross weight of their hogs, and the difference in freight between St. Joseph and Kansas City, aggregating \$225. Defendants in error claim that this loss was suffered by them because of the negligence of the plaintiff in error, in failing to transmit and deliver to them at Sabetha the message delivered to it by Roher at St. Joseph. The plaintiff in error denied negligence on the part of the company, and alleged negligence on the part of the defendants in error; which they, in turn, denied in their reply. A change of venue was taken, and the case sent from Nemaha county to Atchison county, where on the 19th day of March, 1888, it was tried by the court without a jury. The court made findings of fact and of law, and entered judgment thereon in favor of the defendants in error for \$222.90. The plaintiff in error filed a motion for a new trial, which was overruled, and it now comes here with its case made, alleging numerous errors on the part of the court trying the cause, and asks that the case be reversed.

* * * * *

The second assignment for error is, that the court erred in permitting a copy of the message delivered by Roher to the plaintiff company, for transmission to the defendants, to be read in evidence. The contention is, that no proper foundation had been laid for its introduction. The copy offered was identified as a true copy of the original by Roher, by Lee, and substantially by Keneble, the book-keeper of the plaintiff company at St. Joseph. The evidence of A. F. Washington, who was manager of the office of the plaintiff company at St. Joseph, Mo., where the dispatch in question was delivered, shows that the original messages are kept in the office where received for six months, and are then sent to Chicago and destroyed.

The evidence of Jacob Levin, who succeeded Washington as manager of the plaintiff's office at St. Joseph, shows that the original message was not in the St. Joseph office, and not under his control; that original messages are kept in the office where received for transmission six months, and are, by the rules of the company, then sent to Chicago and destroyed. It is true he says he did not see the original message in question in this case destroyed. But he says the rules of the company require them to be destroyed at the end of six months after received. The original message in this case was delivered to the company January 12, 1885, and the depositions of Roher and Lee, who identified the copy, and to which said copy was attached as an exhibit, were taken more than fourteen months afterward. We think the foundation for the admission of the copy was sufficiently established, and that the copy was properly admitted in evidence.

The third point made by plaintiff in its brief is, that the court erred in refusing to strike out of the deposition of Valentine W. Emmert his testimony that "the market value of good average 300 pound hogs at St. Joseph, Mo., on the 12th and 13th days respectively of January, 1885, was \$4.30 gross." The argument is that the evidence of the value of the hogs at St. Joseph was too remote, as fixing any basis upon which to determine the amount of damage that the plaintiff had sustained. The defendants lived at Sabetha, Kansas. St. Joseph was the nearest market of any importance, for hogs, to Sabetha. The evidence shows that the defendants designed shipping their hogs there; had made arrangements by which they were to be informed of the condition of the market there; and would have shipped there if the defendant company had done its duty and transmitted the information contained in the message it failed to send to the defendants. And the evidence shows that, if they had shipped to St. Joseph at the time they shipped to Kansas City, they would have received ten cents more a hundred for their hogs than they did receive at Kansas City, and would have saved the freight from St.

Joseph to Kansas City. We think the measure of damages adopted by the trial court the correct one.

The plaintiff in error complains next that Roher was permitted to explain the meaning of the message received in evidence. While the language of the message was such as to be readily understood by one engaged in the shipment of hogs, it was couched in such terms as to render it ambiguous, and to a certain extent unintelligible to persons not engaged in such business. It is therefore entirely proper to permit its meaning to be explained to the jury by the person who sent it. The substance of the fifth assignment we think wholly immaterial, and therefore no error could be predicated thereon.

The sixth complaint is, that the defendants, over the objection of the plaintiffs, were permitted to prove what the hogs sold for in Kansas City, Missouri, on the 14th of January, 1885. Kansas City, Missouri, is the next hog market to Sabetha after St. Joseph, and the market to which the defendants intended to ship their hogs if they did not ship to St. Joseph, and the market to which they did ship them. The hogs were sold on the market there for the best price they would bring. The admission of this evidence was coupled with the evidence showing that on the very day, January 14th, 1885, on which the hogs were sold in Kansas City, they would have brought the price contended for by the defendants, in St. Joseph, Missouri. There can be no question under the evidence, but that if the plaintiff in error had done its duty and transmitted and delivered the message received by it from Roher to the defendants, they would have shipped their hogs to St. Joseph instead of Kansas City. It is equally certain, under the evidence, that if they had shipped to St. Joseph, and sold in the market either on the 13th or 14th days of January, 1885, they would have received ten cents a hundred more for their hogs than they got for them in the Kansas City market. Having suffered a loss, how is the amount of that loss to be ascertained? The law provides a measurement for loss or damages in cases of this kind, and resort must

be had to the measurement so provided. The only difficulty there is in the matter is in selecting the proper measure by which to gauge the loss or damages. The plaintiff in error claims that the difference in price of the two markets, St. Joseph and Kansas City, is no proper measure of the damages suffered by defendants, and say that they could as well have sold them in the London or San Francisco market, and made the difference in price between either of those markets and St. Joseph the measure of damages. We do not think so. We will not speculate upon what might or might not be the proper measure of damages if the defendants had shipped their hogs to so remote a market as either of those named, but will content ourselves by examining the actual surroundings of the case as disclosed by the evidence, and search for the proper measure of damages in that neighborhood. Looking over the real case in hand, we think the measure of damages approved and adopted by the trial court the simple, natural and proximate measure for damages in cases of this kind, and therefore the proper measure to have applied in estimating the damages in this case. The shrinkage on the weight in transit, and the difference in the price of feed in Kansas City and St. Joseph, in relation to which some evidence was introduced, and of which plaintiff in error complains, was not made a part of the judgment by the court below; hence, no injury to the plaintiff flowed from that evidence.

The plaintiff in error complains that the defendants were permitted to make oral proof of the contents of a written demand which was served upon the agent of the defendant company. It is alleged that there was no proper foundation laid for the proofs so made. The plaintiff in error treats the copy of the written demand delivered to the agent as the original. But the evidence shows that, while a copy of the demand was delivered to the agent, he accepted service, in writing, upon the original, which was kept by the defendant in error serving the same. This original demand was then returned by the defendants in error to their attorneys

Chapman v. Telegraph Co.

who received it, and had it about their office until it became lost; that they made search for it in their office among their papers where it was kept and could not find it. The court, upon this showing, permitted parol proof of its contents. We see no error in this. We are compelled, however, to recommend a reversal of this case, because of error in overruling the motion to suppress depositions.

By the court: It is so ordered.

HORTON, C. J., and VALENTINE, J., concurring.

JOHNSTON, J., dissented from the recommendation of reversal, but concurred in the remainder of the opinion.

NOTE.—See INDEX to this and to previous volumes, titles "Damages," "Evidence."

For earlier Kansas cases on similar subjects, see vol. 2, pp. 575, 581, 588.

CHAPMAN V. WESTERN UNION TELEGRAPH COMPANY.

Kentucky Court of Appeals, June 14, 1890.

(90 Ky. 265.)

FAILURE TO DELIVER TELEGRAM.—RIGHTS OF ADDRESSEE.—DAMAGES.

In an action against a telegraph company by the addressee, for failure to deliver a telegram announcing the dangerous illness of his father, a claim for pecuniary damages based on the assumption that if he had reached his father before his death plaintiff would have received from him a donation of a promissory note, *held*, too remote and conjectural to warrant a recovery.

Held, also, however, that pecuniary loss was unnecessary; that plaintiff might recover substantial damages for his mental distress alone, on account of his being prevented from attending his father in his last illness and being present at his burial.

Cases of this series cited in opinion: *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 736; *Stewart v. W. U. Tel. Co.*, vol. 2, p. 771.

APPEAL by the plaintiff below from judgment rendered at Circuit Court, Marion county.

Joseph G. Covington and N. A. Porter, for appellant.

Wright & McElroy, for appellee.

Judge HOLT delivered the opinion of the court: This is an action against the telegraph company for damages for negligently failing to deliver to the appellant, Joseph Chapman, two telegrams, the one sent on February 12, 1888, announcing to him the dangerous illness of his father, and the other sent on February 16, informing him of his death, and when he would be buried. They were sent from Franklin, Kentucky, to Bowling Green, Kentucky, a distance of about twenty miles. The appellant then resided in the latter city; and, learning upon the street of the death of his father, he called at the telegraph office on February 17, and received the two telegrams. The jury found one cent and the cost of the action.

Inasmuch as it must be tried again, we shall not discuss the evidence relating to the question of negligence. The appellant claims that by reason of it he sustained a pecuniary loss, by missing a donation from his father of a promissory note, which he says his father would have given him if he had seen him in his last illness; and that he was also damaged in his feelings and affections by being thereby prevented from attending upon his father in his last illness, and from attending his burial. The claim for the first item of damage was rejected as being too remote for recovery. The second was ruled out upon the ground that damage to the feelings, not blended with physical pain arising from actual injury, or not connected with pecuniary loss, cannot be a subject of recovery. The lower court substantially instructed the jury that the appellant, if entitled to recover at all, was limited to nominal damages.

The company insists that, as the appellant was not the sender of the telegrams, he can maintain no action whatever. The contract under which they were sent was, however, made for his benefit. He was to be the sole beneficiary. The sender had no interest in them. This the com-

pany knew from their character. In such a case the party for whom a telegram is intended may sue the company for negligence as to it. It is said in Shearman & Redfield on Negligence, section 560: "We think, therefore, that upon the principle of these decisions a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often receive great damage without any means of redress." This is not the English, but it is the American rule, and is, in our opinion, supported by reason, necessity and a proper policy. Gray on Telegraphs, section 65. *Wadsworth v. Telegraph Co.*, 86 Tenn. 695.

The lower court properly rejected the first item of damage. It was too uncertain and remote. Greenleaf on Evidence, volume 2, section 256, says: "The damage to be recovered must always be the *natural and proximate* consequence of the act complained of. This rule is laid down in regard to special damage, but it applies to all damage." It does not naturally follow, if the appellant had received the telegram promptly, that he would have received the donation. *Perhaps* his father would have given him the note. It would not, however, have been a natural consequence of his going to see him. He might, and might not, have done so. No such loss could have been contemplated by the parties to the sending of the message, if their minds had at the time been drawn to the contingency of its not being properly delivered. Considering the nature of the dispatch, they could not have contemplated that such a loss would arise from a breach of the contract. As well might one claim from a railroad company the amount of a stake in a race, upon the ground that, if the train had not been negligently delayed, his horse would have arrived in time, and won the race.

The remaining question is one of some difficulty. It has upon the state of case now presented, been little before the courts, and but few authorities can be found. Indeed, so far as we have been able to find, but two or three courts of

last resort have considered it. One of them has, at least to some extent, varied in its opinion, while the members of another have been divided as to it. It is: Can one, in a case like this, recover damages for an injury to his feelings, unaccompanied by any pecuniary loss or physical suffering from bodily injury? Many of the text writers say that a person can not recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for *some* damage, though it may be nominal only. It has violated its contract; and, whenever a party does so, he is liable at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled, in such a case, to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to *some* damages by reason of the other party's wrongful act, should not the complaining party recover *all* the damages arising from it? It seems to us that no sound reason can be given to the contrary.

The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end can not yet be seen. A telegraph company is a *quasi* public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for a hundred dollars, or even less, it is responsible for the damage. It is said, however, that if

it is guilty of like fault as to a message to the husband that the wife is dying, or to the father that his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such a rule, at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity, as to the greater. It seems to us that both reason and public policy require that it should answer for injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the *actual* damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so it may be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why any injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element of actual damage in slander, libel and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity; and legal insult added to outrage by the party, by offering one cent or the cost of the telegram as compensation to the injured party. Whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages. In *Shearman & Redfield on Negligence*, section 605, it is said: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. *Delay in the announcement of a death*, an arrival, the straying or recovery of a child, and the like, may often be productive

of an injury to the feelings which can not be easily estimated in money, but for which a jury should be at liberty to award fair damages. Yet in some cases the damages ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message."

This seems to be to us the true rule, one which is in accord with reason, and necessary to a proper protection of individual right, and the interests of the public. The cases of *Stuart v. Western Union Telegraph Company*, 66 Tex. 580, and *Wadsworth* against the same company, *supra*, support this view of the question; and, the instructions of the lower court being *contra*, the judgment is reversed, and the cause remanded for a new trial, consistent with the views herein expressed.

This case is cited in *Crawson v. W. U. Tel. Co.* and *Young v. W. U. Tel. Co.*, *post*.

NOTE.—See INDEX to this and previous volumes, titles "Damages," "Rights of Addressee;" also "Notes" upon said subjects.

The only Kentucky case upon the duties of telegraph companies as carriers appearing in earlier volumes of this series is *Smith v. W. U. Tel. Co.*, vol. 1, p. 748.

In *Rich Grain Distilling Co. v. W. U. Tel. Co.*, Kentucky Supreme Court, March 11, 1891 (18 Ky. Law Reporter, 256), which was an action for failure of a telegraph company to deliver a message sent by a distilling company to a firm of boiler-makers in this language: "Send man at once; blister on boiler. Answer," *held*, that within the rule of *Hadley v. Baxendale*, the plaintiff was properly allowed to recover an amount equal to the wages of its employees during the time of their enforced idleness caused by the delay; also the amount paid for procuring food for certain cattle which were customarily fed on the distillery "slops."

WESTERN UNION TELEGRAPH COMPANY v. J. M. ALLEN.

Mississippi Supreme Court, June 3, 1889.

(66 Miss. 549.)

FAILURE TO DELIVER TELEGRAM.—PENALTY.—RIGHTS OF ADDRESSEE.

A statutory penalty for failure to deliver a telegram promptly may be recovered by the person to whom it was addressed, although the message had no pecuniary value to him and the price of transmission was paid by the sender.

APPEAL from Circuit Court, Lee county. Action by addressee for failure to deliver three telegrams. Appeal by defendant below. Further facts appear in opinion.

Sykes and Richardson, for appellant.

Allen, Robins and Stribling, for appellee.

COOPER, J., delivered the opinion of the court: By an act approved March 18, 1886 (Acts of 1886, p. 91), it is provided:

That if any telegraph company shall neglect, fail, or refuse to transmit and deliver, within a reasonable time, without good and sufficient excuse, any message delivered to it for such purpose, the person injured shall receive (recover), the sum of twenty-five dollars in addition to such damages as are now allowed by law.

The appellee was the sendee of three message of a social character, which were not delivered within a reasonable time, without excuse, and for such neglect to deliver, he instituted this action to recover the statutory penalty, claiming no other damages.

There is an agreed statement of facts on which the case was tried, by which it appears that each of the several messages was delivered to the company for transmission

and the charges paid by the sender; that the message were of no pecuniary value to appellee, and that he has sustained no pecuniary loss by the failure to deliver the message.

Appellant contends that the statute only gives the penalty it imposes to the party "injured" by the neglect, and that it is given "in addition to such other damages as are not allowed by law," and that a sendee of a message has a right of action against a telegraph company for neglect to deliver.

The important question is thus presented to the court whether any duty is assumed by a telegraph company to the person to whom a message is addressed, who has paid nothing for its transmission, for breach of which an action will lie in his favor.

It is well settled in England that under such circumstances no action can be maintained, even though the company negligently delivers a different message than that it received, by reason of which the sendee, acting on the message delivered to him, sustains pecuniary loss.

In America the contrary rule is announced, where injury results from the delivery of a message other than that transmitted; but the courts are not agreed upon the principle upon which the action rests. In his work *Communications by Telegraph*, Mr. Gray classifies the decisions made by the American courts on this subject, and declares that no satisfactory ground has been found on which, in analogy to legal principles, the liability of the company can be rested. As stated by him, the liability has been put upon some one of the following grounds:

1. That, as a telegraph company is in the exercise of a public, as distinguished from a private, calling, it is the common agent of both parties to a telegraph message, or a public agent liable to any one injured by its negligence.

2. That the person addressed is the beneficiary of a contract.

3. That the message is the property of the person addressed, the position of such person being analogous to that of a consignee of goods.

4. That the sendee is the principal of the telegraph company in those cases where he originally employed the company. *Gray on Communications by Telegraph*, 117-122. While it may be difficult to reply to the criticisms of the grounds upon which the American decisions rest, it must be regarded as settled by an almost broken current, that the telegraph company is under responsibility to the sendee, at least in those cases in which injury results from the delivery of an altered message. Mr. Bigelow suggests as a satisfactory ground for holding the company liable under such circumstances, the fact that the communication by telegraph is usually resorted to only in matters of importance, by reason of which the company ought to infer that its transmission is a matter of consequence, and that a "mistake in its transmission will be likely to produce damage to the receiver, by causing him to do that which otherwise he would not do. Knowing, then, the probably evil consequences of transmitting an erroneous message, they owe a duty to the receiver of refraining from such act; and if (by negligence) they violate this duty, they must, on plain legal principles, be liable for the damage produced." *Leading Cases on Torts*, 602.

It will be noted that this proposed solution of the difficulty begins with the assumption that the telegraph company, by accepting the message, comes under the obligation of a "duty" to the sendee.

If it be true, as suggested, that the telegraph company, by accepting the message for transmission, comes under a duty to the addressee, it does not seem to be difficult to find equal liability for delay in its transmission, or for failing to deliver, as exists for the delivery of an altered message. Delay or neglect to deliver is as much a breach of duty, if a duty exists, as is the delivery of an altered message. The reason of the existence of such companies, is not that by them messages may be more accurately transmitted than by the ordinary means of communication, but it is because they may be more rapidly transmitted, and it cannot be seriously contended that a telegraph company might be

liable for an erroneous delivery on the ground that the nature of its business indicated to it the importance of delivering the exact message sent, and at the same time its responsibility denied for damages caused by delay in delivering the message, because it is not advised by the nature of its business of the importance of speedy delivery.

The English courts end all controversies by declaring that the obligation of the company is to the sender alone; that it owes no duty to the sendee; and, because it does not, is not liable either for delay or for the delivery of an altered message. The key to the question is whether a duty exists to the sendee. If it does, and there is a breach of that duty, the consequence is, and must be, responsibility for the injury that flows from the breach. It is admitted that the almost universal doctrine of the American courts is that a telegraph company is liable for damages resulting from the delivery of a changed message. It cannot be denied that no such liability would result from a negligent mistake of a private person. The conclusion is inevitable that a different rule is applied in the one case than in the other; it is equally certain that the reason of the difference is, that telegraph companies perform public duties, *i. e.*, are devoted to public service, and the interest of the public can only be conserved by holding them liable under circumstances where no liability would attach to the default of private persons. Telegraph companies are essential agents in the transactions of commerce. They have found and occupied a field peculiar to themselves, which neither their interest nor the welfare of the world can permit to be again vacant. Their rights, duties and responsibilities are neither that of common carriers, of agents, bailees or servants. They are independent transmitters of intelligence, acting for themselves in and about the business of others. In the very nature of things, they are relied on equally by those who transmit and those who receive messages committed to their hands. The injury that follows the neglect may be at one or the other end of their line, or at both at once, and of this they are informed by the very nature of

the business in which they are engaged. It may be safely said that there are thousands of persons, sendees of messages, who are daily subjected to danger of loss by reason of delay or error in the transmission of telegraph messages, to one who, in the early history of the English law, relied upon the services of the common carrier. The courts then, as the courts now, conscious of the needs of the public, expanded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public. The rule that a husband was entitled to curtesy in the equitable estate of the wife was denied application to the case where the wife claimed dower in the equitable estate of the husband, for the reason that the public had acted upon a contrary belief; and yet it is impossible to give a logical reason why it should not have been applied in the one instance as well as the other. The system of laws peculiar to partnerships was created by the courts because of a necessity for its existence. There is probably no principle on which the courts have agreed, or which is consistent with the body of the laws, from which the liability of municipal corporations for injury to a traveler resulting from defective ways can logically be drawn. Instances might be multiplied in which courts, pressed by the public necessities, and in the absence of legislative remedy, have afforded relief. So it is with reference to the class of cases now under consideration. The courts, impressed with the justice of the claim of him who has sustained injury to compensation from the delinquent who has caused it, have, on one or another analogy, afforded relief. It may be admitted that technical objections can be made to the application of each and every principle, in analogy to which they act. To those decisions, in which the telegraph company is treated as bailee, it may be objected that a bailee is one who receives property, and that intelligence is not property subject to bailment. To those which deduce the liability from the principles of agency, that the company is agent only for him who

employs it. To those who hold that the sendee may sue upon the contract as one made for his benefit; that one not a party to an executory contract has no right of action on it. To those which declare that the telegraph company is in the exercise of a public employment, and is responsible for any breach of duty; that it owes no duty to the public as individuals except to contract with each on his demand, and that there is no contract save with the sender of the message. It yet remains true that the courts on some one or the other of these grounds have steadily adhered to the rule of liability. The fundamental principle is that there is some breach of duty, and whether this duty is logically deduced from any well recognized rules applicable to other relations becomes immaterial when there is a consensus of judicial opinion as to its existence. We are content to take our place in the line of American authorities, and, without assenting fully to either of the processes of reasoning by which the result has been reached, to accept as settled the rule of liability, because the telegraph company is a public agent, and as such, from the peculiar character of its business, is connected with the sendee of the message so far as to impose upon it a duty to deliver the intelligence intrusted to it for him. Whether this be property, or simply an intangible thing of value to him, it is that which the company is under duty to communicate according to its course of business, and delay in the delivery is as much a breach of duty as the delivery of an altered message, and, in either event, recovery may be had by the sendee.

In the case under consideration, though no pecuniary injury was sustained, there was a violation of the legal right of appellees, and a consequent right to recover damages, though nominal, and to this is added the penalty given by the statute.

The judgment is affirmed.

NOTE.—See INDEX to this and to prior volumes, title "Receiver or Addressee;" also "Notes" on same subject.

See note to *Wilkins v. W. U. Tel. Co.*, *post*.

WESTERN UNION TELEGRAPH COMPANY V. DOZIER.

Mississippi Supreme Court, Feb. 24, 1890.

(67 Miss. 288.)

FAILURE TO TRANSMIT MESSAGE OFFERED VERBALLY.

Plaintiff, a physician, claiming to be the addressee of a telegram which was never sent, sued the telegraph company and recovered the amount he would have charged for the services which the alleged telegram summoned him to perform.

No written message was in fact presented for transmission to plaintiff, nor was any message to him charged or paid for.

Held, that in absence of satisfactory evidence of a known course of business by a telegraph company to receive for transmission messages verbally delivered to operators, it will not be held liable for failure to transmit such a message. Judgment therefore reversed.

APPEAL from Circuit Court, Perry county.

One Bilbo, his son being wounded, sent two messengers to telegraph from Poplarville to Hattiesburg to telegraph for Dr. Dozier, the plaintiff. Instead they telegraphed, unsuccessfully, for two other physicians, paying for one telegram with money which Bilbo had given them. The operator then telegraphed, voluntarily, as he testified, at any rate without any written message, to the operator at Hattiesburgh to learn if plaintiff was there, and was told in reply that he had removed. He was, in fact, there. Bilbo afterward paid for the second telegram sent by his messengers, but paid for none to plaintiff. Action to recover \$110 the amount plaintiff would have charged for the services required. From a judgment in his favor the defendant appealed.

W. P. & J. B. Harris, for appellant.

Calhoon & Green, for appellee.

CAMPBELL, J. : The verdict is contrary to the law and evidence, and should have been set aside. There is no warrant in the evidence, in any view of the law, for a recovery of an actual damage, for none is shown ; it not appearing that Dr. Dozier sustained any by reason of the non-receipt of a message requesting his services. The truth appears to be that no message was sent to Dr. Dozier, but that, an ineffectual effort having been made to get Dr. Walker at Nicholson, and Dr. Watkins at Hattiesburg, the operator at Poplarville inquired of the operator at Hattiesburg if Dr. Dozier was in the town, and was informed, in reply, that he had removed to Gulf Port, and, this being supposed to be true, no message was sent to Dr. Dozier. It is certain that no message to him was charged for or paid for, and therefore nothing was received by the company on this account. It appears that the operator, Mr. Atkins, was in full sympathy with those trying to procure a physician ; and at his own instance, and free of cost to them, wired to Ellisville for the purpose of getting a physician known to him, who lived there ; and this suggests the improbability that he should have failed to transmit any message delivered to him to be sent to Dr. Dozier.

The only messages actually written for transmission were to Dr. Walker at Nicholson, and to Dr. Watkins at Hattiesburg, and they were transmitted. If it be true that Stewart and Flannagan, or either, told the operator to wire Dr. Dozier, the question is whether that was the delivery of a message, within the meaning of the law, for the non-transmission and delivery of which liability would be incurred by the company. In the absence of satisfactory evidence of a known course of business by the telegraph company to receive verbal messages orally delivered to operators for transmission, we are not willing to sanction the proposition that failure to transmit such a message is a ground for recovery against the company, either by statute or common law. It is common knowledge that messages are required to be written ; and upon the blank of the company, and it would be hazardous to pursue any other course. The very

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expression, as to a message delivered to be sent, carried with it the idea of a written or printed message; and it would seem that for one to talk to the operator, as to the message he desired to send, could not, in view of the course of business of telegraph companies, impose any liability on such company.

Reversed and remanded.

NOTE.—See note to next case.

T. B. WILKINS v. WESTERN UNION TELEGRAPH COMPANY.

Mississippi Supreme Court, Feb. 3, 1891.

(68 Miss. 6.)

TELEGRAPH STATUTE IMPOSING PENALTY.—RES JUDICATA.

The Mississippi Statute, Acts 1886, p. 91, imposing a penalty upon telegraph companies for failure to "deliver messages within a reasonable time," applies only to neglect, failure or refusal as to time; and an action for damages due to error in transmission is not barred by a previous suit for and recovery of the statutory penalty.

APPEAL from Circuit Court, Lee county.

Action for damages for error in transmission and delivery of a telegram, the word "Wilkins" appearing as "Williams" in the telegram as delivered to the addressee. Appeal by plaintiff below from judgment sustaining demurrer to replication.

Clayton & Anderson, for appellant.

Sykes & Richardson and *W. P. & J. B. Harris*, for appellee.

CAMPBELL, J., delivered the opinion of the court: The demurrer to the replication to the plea of *res adjudi-*

cata should have been overruled or extended to the plea, which is bad for two reasons : (1.) Because the act entitled "*An act to require telegraph companies to deliver messages within a reasonable time*," approved March 18, 1886, Acts, p. 91, does not apply in case of erroneous transmission of messages, but only where there is neglect or failure to transmit and deliver. The penalty is denounced against dereliction of duty by neglect, refusal or failure as to time. Its purpose was to insure promptness, and not accuracy, in the transmission and delivery of messages. Therefore a recovery by Wilkins to which he was not entitled did not bar this action.

(2.) The twenty-five dollars provided by the act cited is not a part of an *entire* demand, but is a separate and distinct thing, for which one entitled may sue and recover, without suing for anything else ; and such recovery is not a bar to another action for a distinct thing. The manifest purpose of the act was to incite to promptitude by telegraph companies by subjecting to liability to a recovery of twenty-five dollars, as a penalty for every failure of duty in the particulars mentioned by it, whatever else the company derelict in this might be liable for.

Judgment reversed and case remanded.

NOTE.—In addition to the three foregoing cases, the following others were decided by the Supreme Court of Mississippi during the period covered by this volume :

Alexander v. W. U. Tel. Co., October, 1889 (87 Miss. 386).

This action arose upon a demurrer to a complaint in which plaintiff claimed that by reason of the alleged negligence of defendant in delaying a telegram he lost an opportunity to buy a \$5,000 lot for \$3,000, and was damaged the difference. Upon a former appeal (66 Miss. 161), it had been held that the complaint was not demurrable; that the damages claimed were not speculative, remote or contingent; that plaintiff was entitled in any event, under the pleading, to recover the amount paid for transmission; that the demand of a statutory penalty, which by reason of the telegram being an interstate message could not be recovered, did not make the whole complaint bad. The case was remanded for a new trial, and this was the second appeal.

The court here held that so much of the complaint as charged the defendant with loss caused by failure to deliver a telegram accepting an

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offer should be abandoned, since the facts disclosed that no offer was made; but that the true ground of complaint was that the defendant failed to deliver a message instructing plaintiff's agent to buy land, by reason of which the chance to purchase advantageously was lost. Cause remanded for trial of said issue.

In *Western Union Tel. Co. v. Goodbar*, Feb. 8, 1890 (7 So. Rep. 214), held, that the omission by the operator at the terminal office, of two words of a telegram, in receiving and transmitting it for delivery, he having been informed of the number of words as transmitted, and having signalled the transmitting operator that the correct number of words had been received by him, was gross negligence, which could not be excused upon a plea of unfavorable condition of the elements.

In *Western Union Tel. Co. v. Liddell*, Jan. 12, 1891 (68 Miss. 1), the facts were as follows: Liddell, the plaintiff below, when he left his hotel at Greenwood on Saturday morning to take the train to Carrollton, gave his valise to a porter to take to the depot. He missed it after he got upon the train, and telegraphed back from Carrollton to the station agent, who was unable to find it at the depot, though it was proven to have been there that morning. The next day he sent to the Carrollton operator, by a messenger, a message written upon a leaf torn from a note-book, with reference to the valise. Nothing was said by either messenger or operator, no money was paid or tendered, and there was no evidence that the operator knew it was intended as a message for transmission.

The action being to recover the value of the lost valise, held, (1.) That the failure to send the telegram was in no sense the proximate cause of the loss of the valise; (2.) that there was in legal contemplation no failure by the company to transmit a message which it was bound to send.

Western Union Tel. Co., v. Clifton & Eckford, Feb. 16, 1891 (68 Miss. 307).

Under the rule that a person injured by the negligent act or omission of another can recover damages only for the probable results of such act or omission, held, that for delay in the transmission of a telegram addressed to a lawyer, by which delay the addressee lost an opportunity to earn a fee (the telegram in no way indicating such a probable injury), a telegraph company cannot be charged with the full amount of the lost fee.

In *Western Union Tel. Co. v. Rogers*, May 25, 1891 (68 Miss. 748), held, that the addressee of a telegram could not recover for mental distress caused by failure of the company to deliver it to him in season for him to attend the funeral of his brother, whose death the message announced.

Meggett v. W. U. Tel. Co., October, 1891 (69 Miss. 198), is an unimportant case, in which the trial court directed a verdict for the defendant, and such disposition of the case was affirmed.

Earlier Mississippi telegraph cases may be found at vol. 1, p. 141, and vol. 2, p. 625.

**JOSEPH BURNETT, Respondent, v. THE WESTERN UNION
TELEGRAPH COMPANY, Appellant.**

St. Louis Court of Appeals, March 4, 1890.

(89 Mo. App. 599.)

**FAILURE TO TRANSMIT TELEGRAM.—MISSOURI PENAL STATUTE.—SUNDAY
DISPATCH.**

The Missouri statute, R. S. 1879, sec. 883, imposes a penalty upon telegraph companies for neglect or refusal to perform a three-fold duty: (1) To transmit messages; (2) to transmit them with impartiality; and (3) to transmit them with good faith. And "neglect" applies to each. The penalty may therefore be imposed for failure to transmit a message at all.

The statute compared with those of Indiana and Arkansas.

The transmission of a message from a husband, who had been unexpectedly detained from home longer than he anticipated when he departed, notifying his wife when he would return, held to be a work of "necessity," or in any event, of "charity," which may lawfully be contracted for on Sunday.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Axtell*, vol. 1, p. 295; *W. U. Tel. Co. v. Mossler*, vol. 1, p. 645; *W. U. Tel. Co. v. Kinney*, vol. 2, p. 8; *W. U. Tel. Co. v. Harding*, vol. 1, p. 814; *W. U. Tel. Co. v. Steele*, vol. 2, p. 588; *W. U. Tel. Co. v. Wilson*, vol. 2, p. 519; *W. U. Tel. Co. v. Brown*, vol. 2, p. 508; *W. U. Tel. Co. v. Swain*, vol. 2, p. 589; *Frauenthal v. W. U. Tel. Co.*, vol. 2, p. 479; *W. U. Tel. Co. v. Buchanan*, vol. 1, p. 1; *Logan v. W. U. Tel. Co.*, vol. 1, p. 285; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *Gulf, &c. Co. v. I. Levy*, vol. 1, p. 586; *Russell v. W. U. Tel. Co.*, vol. 1, p. 658; *Stuart v. W. U. Tel. Co.*, vol. 2, p. 771; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 848; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 786; *Thompson v. W. U. Tel. Co.*, vol. 2, p. 684; *Rogers v. W. U. Tel. Co.*, vol. 1, p. 886; *W. U. Tel. Co. v. Yopst*, vol. 2, p. 558.

APPEAL from the Monroe Circuit Court.

Charles E. Yeater, for the appellant.

Rodes, Waller & Rodes, for the respondent.

Burnett v. Telegraph Co.

THOMPSON, J., delivered the opinion of the court: Section 883 of the Revised Statutes of 1879 reads as follows:

It shall be the duty of every telephone or telegraph company, incorporated or unincorporated, operating any telephone or telegraphic line in this State, to receive dispatches from and for any individual, and on payment or tender of their usual charges for transmitting dispatches, as established by the rules and regulations of such telephone or telegraph line, to transmit the same with impartiality and good faith, under a penalty of one hundred dollars for every neglect or refusal so to do, to be recovered, with costs of suit, by civil action for the benefit of the person or persons or the company sending or desiring to send such dispatch.

This action is brought to recover the penalty of one hundred dollars given by the above statute.

The case was tried before the court, sitting as a jury, and judgment was entered for the plaintiff for the penalty of the statute, and the defendant prosecutes this appeal.

There is no controversy about the facts. Some of them are agreed upon by the counsel for the respective parties and the rest are delivered in the form of the testimony of the plaintiff, while the defendant offered no evidence. The parties have united upon the following agreed statement:

On Sunday, June 10, 1888, the plaintiff delivered to defendant's duly authorized agents at Hannibal, Missouri, a certain dispatch and message substantially as follows:

"HANNIBAL, Mo., June 10, 1888.

To Mrs. Joe Burnett, Monroe City, Mo.:

I will be home to-night.

[Signed],

JOE BURNETT."

The above dispatch was delivered to defendant's agent about the hour of six o'clock—being near the hour the agents of the company changed, viz., about the hour the agent of the day left the service of the office and the night agent went on duty. The plaintiff paid the usual charges demanded for sending the message, viz., the sum of twenty-five cents, and the company retained the same. The company never transmitted or delivered the message to the addressee. It is agreed that the agents of the company will testify that they have no knowledge whatever of the

message and that the same is not found upon the files of the company, and the agents can give no account of said message. It is admitted that the defendant is a corporation and doing business, as alleged in the amended petition, and admitted that notice was served as alleged in said petition and within the time alleged therein, and that all proper demands have been made by plaintiff. The fact, as alleged in said amended petition, is not admitted by defendant and is left open to plaintiff's proof to be adduced. It is also agreed that either the plaintiff or defendant may make any objection to the competency of the testimony, as set forth herein, and defendant may make any legal objection to the petition which he may desire. The message was written and filled out on one of defendant's blanks, a copy of which is hereto attached and marked "A." It is agreed the company's agents will testify they have no knowledge why the said message was not transmitted and delivered — unless the said message was lost. Plaintiff did not pay to have the message repeated. In the event of a trial it is agreed this stipulation may be read in evidence.

The plaintiff testified, as a witness, as follows:

"I am the plaintiff in this case. I am a married man, and my family consists of my wife and four children, ranging from three to thirteen years of age. On Saturday, the ninth day of June, 1888, I came from my home at Monroe City, in this county, to Paris, on the noon train. Before leaving, I told my wife I would be back the next day, which was Sunday. At Paris, on that Saturday night, I attended a meeting of my lodge, and at that meeting I received news of the death of Wm. C. Foreman, at Hannibal, Missouri, and I decided then to attend, with the lodge, his funeral at that place the next day, and that Saturday night I went to Hannibal, and did attend the funeral the next day. On the afternoon of the next day, which was Sunday, June 10th, 1888, I went to the telegraph office to notify my wife that I would not be home until late that night, or rather on the train which arrives at two o'clock in

the morning of the next day. I gave the operator the message described in the petition, and asked him to have it transmitted and delivered immediately to my wife, explaining my absence and notifying her when I would arrive. This I always do when I am detained from home longer than I anticipate, and my wife expects it, and is anxious when I do not notify her. I explained this to the telegraph operator, and impressed him with the importance of the dispatch. The message never reached my wife, and, when I arrived at home, I found her sitting up awaiting me, and very anxious. I paid the operator twenty-five cents, what he demanded for sending the message, and the company have never refunded it. I asked the agent of the defendant, to whom I gave the dispatch, if it could be sent and delivered at once, and he said it could. I explained the necessity that required the prompt sending and delivering of the message to this agent before I left the office, and the agent promised to send the message immediately." On cross-examination, the witness stated that he could not say exactly at what time he received the information which led him to decide to go to Hannibal, or when he did decide so to go; but it was sometime during the lodge meeting. He did not know whether or not he could have sent a telegram on Saturday night after making up his mind to go to Hannibal. He never thought of it. In answer to the question, "Could you not have sent the information in some way to your wife on Saturday night that you would not be at home at the expected time the next day?" he said: "I do not know. I might have done so; but I never attempted to do so, because I thought that I would see somebody on the night train by whom I could send word to my wife; but did not see any one by whom I could convey such information, and I was engaged all day Sunday attending the funeral and burial services, and could not send the dispatch sooner than I did."

This was all the evidence; and, thereupon, the court gave several declarations of law, and refused others, which; so

far as deemed material, will be set out and comm upon:

I. The first assignment of error is that the court en declaring the law to be "that this statute is ren rather than penal." There is no doubt that this w erroneous view of the classification of the statute imposes a severe penalty for that which may, unde cumstances, visit slight damages upon the sender o message. It is the same in substance, though not the same in language, as the former Indiana st (repealed by substitution in 1885), which was, by Supreme Court of that State, always construed as a j statute. *Western Union Tel. Co. v. Axtell*, 69 Ind. *Western Union Tel. Co. v. Mossler*, 95 Ind. 29; *Wes Union Tel. Co. v. Kinney*, 106 Ind. 468; *Wes Union Tel. Co. v. Harding*, 103 Ind. 505; *Wes Union Tel. Co. v. Steele*, 108 Ind. 163; *Western Un Tel. Co. v. Wilson*, 108 Ind. 308; *Western Union Co. v. Brown*, 108 Ind. 538. So far, then, as there is difference in the rules of construction to be applie between a penal statute and a remedial statute, we hav doubt that this statute is to be construed as a penal stat But it does not at all follow from this that the judgmen the Circuit Court is to be reversed; for the question decision before the court arose upon an undisputed sta facts, and in such cases, although the court may have ceeded upon erroneous views of the law, yet if, on the w evidence, the judgment was a proper application of the to the facts, it cannot be reversed.

II. The court found as fact that there was "no evid of any wilful failure or wilful refusal of defendant to this message;" and also that there was "no evidenc any wilful neglect, or of any bad faith or partiality on part of the defendant." The court also found and decl "that the defendant failed to transmit the message, that, in failing to transmit the message, the defendant guilty of negligence, and that, for neglecting to tran the message, the defendant is liable in this action."

court also declared the law to be "that the limitation of 'neglect' to 'impartiality' or 'good faith' applies only to cases where the message is transmitted;" and that "neglect to transmit at all does not require the additional feature of partiality or want of good faith; the greater includes the less." The court also refused a declaration of law in the nature of a demurrer to the evidence, and also refused the following declaration of law tendered by the defendant: "It devolves upon the plaintiff to show affirmatively that the telegraph company, in failing to transmit the dispatch, was guilty of partiality and bad faith; and unless it appears from the evidence that the telegraph company was guilty of a preference against the plaintiff, or exercised bad faith towards him, he cannot recover the penalty provided by the statute." The clause of the statute, to which these rulings were addressed, and of which they were intended as an exposition, reads, "to transmit the same with impartiality and good faith, under a penalty," etc.

Counsel for defendant does not, as we understand him, go to the length of taking the position that the company does not make itself subject to the penalty for failing to transmit at all, but that it is not subject to the penalty, unless the plaintiff makes it appear that the failure to transmit was the result of the defendant's want of impartiality and good faith; in other words, that the gist of the offense, for which the statute gives the penalty, is partiality and bad faith in the conduct of its public duty of sending messages over its wires. This is a very restricted view of the statute, which we do not think we are required to take, even by the most stringent application of the rule that penal statutes are to be construed strictly. We rather think that the duty stated in the clause of the statute above quoted must be understood as being a condensed statement of a three-fold duty. *First*, to transmit messages tendered for that purpose with the charges established by the company's rules and regulations. *Second*, to transmit such messages with impartiality. *Third*, to transmit such messages with good faith. We also think that the word "neglect" in the

succeeding clause, which reads, "under a penalty of one hundred dollars for every neglect or refusal so to do," is to be construed as meaning neglect to perform either of these three duties.

The defendant's view would fritter the statute away, and render it entirely useless in every case where the dispatch is received and the customary charges collected, and the dispatch is not sent at all, as in the case at bar. How, in the nature of things, could the sender of the dispatch prove, beyond the inference that would arise from the mere failure to transmit, that the company had been guilty of partiality and bad faith? How could he get out of the employees of defendant, who alone would have knowledge of the real reason of the failure to transmit the dispatch, evidence which would convict them of so gross a violation of duty? Under such a view of the statute, the agent of the telegraph company could receive the dispatch, and throw it into the waste basket, or into the fire, the moment the sender's back was turned, and the latter could never recover the penalty denounced by the statute. This would cut the statute down so as to make it mean that the penalty could be recovered only in cases where the dispatch was in fact transmitted, but where it was not transmitted with impartiality, that is, where other dispatches received later had been sent before it; or where it had not been transmitted in good faith, that is, where the agents of the company had corruptly delayed sending it to effect some purpose that might be imagined. We think that this would be a partial judicial repeal of the statute.

Our attention has been called to decisions in Indiana and Arkansas, construing similar statutes in those two States enacted in the year 1885, which hold that the penalty denounced by the statute is not recoverable in the case of a mere *neglect* to transmit the message, that is, that it is not given as a punishment for mere negligence. *Western Union Tel. Co. v. Steele*, 108 Ind. 163; *Western Union Tel. Co. v. Swain*, 109 Ind. 405; *Frauenthal v. Western Union Tel. Co.*, 6 S. W. Rep. (Ark.) 236. Under the prior

statute of Indiana (R. S. Ind. 1881, section 4176), it was held that the right of action accrued where the failure to transmit the dispatch was the mere result of negligence. Thus in *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; s. c., 9 Am. Rep. 744, the message was, by mistake, and in consequence of the gross ignorance of the defendant's operator, sent to the wrong place, but an action for the penalty was nevertheless sustained. The Indiana statute then under consideration was substantially the same in its terms as our statute. It used the words, "shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty in case of failure to transmit, or, if postponed out of such order, of one hundred dollars to be recovered by the person whose dispatch is *neglected* or postponed." Our statute likewise requires the company "to transmit the same with impartiality and good faith, under a penalty of one hundred dollars for every *neglect* or refusal to do so," etc. But the statute of Indiana of 1885 was drawn in terms quite different. The first section prescribed the duty, and the third section denounced the penalty; but neither section used the word "neglect," or employed language, from which the necessary inference could be drawn that the Legislature meant to give the penalty for mere negligence in transmitting telegraph messages. The holdings under the latter act were influenced by the view that the Legislature, in omitting the use of the word "neglect" or any equivalent word, intended to change the rule. This will appear from the following language of Mr. Chief Justice ELLIOTT, in the opinion of the court in *Western Union Tel. Co. v. Steele*, *supra*: "This conclusion is, indeed, the only one that can be reached without greatly enlarging the words of the statute, and it is strengthened by the fact that the statute, which the statute of 1885 repeals, prescribed a penalty for a negligent breach of duty, while that of 1885 contains no such provision, thus clearly evincing the intention of the Legislature not to give a penalty for a negligent breach of duty."

The Arkansas statute of 1885 more clearly pointed to a purpose on the part of the Legislature to change the rule, than did the Indiana statute. Prior to the adoption of this last statute in Arkansas, there had been on the statute books of that State a statute (Mans. Ark. Dig., sec. 6419), which gave a penalty for the negligent failure to transmit a dispatch. This statute was, by the act of 1885, expressly repealed. In view of this repeal, and in view of the further fact that the new statute nowhere contained the word "neglect" or any word of equivalent import, but merely made use of the word "refuse," the court could not do otherwise than hold that it was not intended to give the extraordinary penalty of five hundred dollars for mere negligence in failing to transmit a dispatch, which might result in slight damage to the sender. The court quote with approval the above language of Chief Justice ELLIOTT, and the conclusion is entirely obvious.

But the analogous decisions for the interpretation of our statute, in respect of this question, are the decisions under the prior Indiana statute, which, as above pointed out, was drawn in terms substantially similar to our present statute; and the authority of the Supreme Court of that State, in construing that statute, is persuasive to the effect that, when the Legislature used the word "neglect," it intended to give the penalty for the mere negligent failure to transmit a dispatch.

Aside from authority, there is sound reason for this conclusion. There are many cases where telegraph messages relate to family affairs, and where great mental suffering and affliction are produced by the failure to transmit them, in which the law will give no more than nominal damages, or the cost of sending the message. Illustrations of this will be found in *Logan v. Tel. Co.*, 84 Ill. 468, where the dispatch, which was not transmitted, summoned a son to the deathbed of his mother, and the court intimated that the rule of damages would be nominal damages, or the cost of sending the dispatch. It is further illustrated in *West v. Tel. Co.*, 39 Kan. 93, where the action was for damages

for failing to deliver a message, in which a son notified his father of the death and funeral of a brother of the latter, and it was intimated that damages for the mental disappointment and suffering could not be recovered. These, and other like decisions (*Gulf, etc. Ry. Co. v. Levy*, 59 Tex. 563; *Russell v. Tel. Co.*, 3 Dak. 315), produced upon the well-known rule that there can be no recovery for mere mental suffering, which is not the proximate consequence of a physical injury,—except in the case of breach of promise of marriage, and possibly in some other exceptional cases. While there is some tendency in recent cases to break away from this rule (see *Stuart v. Tel. Co.*, 66 Tex. 580; S. C. 59 Am. Rep. 623; *So Belle v. Tel. Co.*, 55 Tex. 308; S. C., 40 Am. Rep. 805; *Wadsworth v. Tel. Co.*, 86 Tenn. 695; S. C., 6 Am. St. Rep. 864), yet it is apprehended that the well-known general rule, which would deprive the sender of a telegraphic message from the recovery of damages, beyond the amount paid for transmitting the dispatch, where the damages would be given as a mere solatium for wounded pride, affection or other so-called mental feelings, may have been one of the reasons which induced the Legislature, on grounds of public policy, to enact a statute giving damages in such cases in the form of a penalty.

III. The message was tendered for transmission on Sunday. The defendant tendered a declaration of law to the effect that, this being the allegation in the petition and the undisputed evidence, “the finding must be for the telegraph company, unless the evidence further shows that the sending of said dispatch was a work of necessity;” also another declaration of law as follows: “The said dispatch was not a work of necessity, unless, under all the circumstances, it appears from the evidence that it was absolutely requisite that it should be sent on Sunday. But, if the evidence shows that it was a work of necessity, but that the plaintiff neglected to send a similar dispatch or similar information on the preceding day, and by such neglect on his part created a necessity for sending it

on Sunday, he cannot recover." The court also gave, at the request of the plaintiff, the following: "The court declares the law to be that the necessity contemplated by the Sunday law is not an absolute necessity, but a relative necessity; and such a relative necessity may be a necessity arising from inadvertence on the part of the person pleading the necessity, but not from wilfulness. The pulling of ears of barley in a field on Sunday to appease a hunger, which might have been readily provided for on the preceding day, would not be *per se* a violation of the Sunday law." The court also found as a fact "that the sending of the message and transmitting of the message on Sunday was a work of necessity." These rulings indicate the theory of the court, that the sending of this dispatch, under the circumstances disclosed in the evidence, was a work of necessity, and that it was none the less so because the necessity, which arose for sending it on Sunday, instead of the previous day, may have been due to the plaintiff's inadvertence. If the sending of this message was not a work of necessity or charity, so as to fall within the prohibition of section 1578, Revised Statutes of 1879, the plaintiff can not recover, because no action will lie for the failure to perform an act prohibited by law. *Thompson v. Tel. Co.*, 32 Mo. App. 191; *Rogers v. Tel. Co.*, 78 Ind. 169; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248.

It will be perceived that in these declarations of law, both those which were given and those which were refused, the court proceeded upon the view that the only exception created by the statute, which denounces the performance of work and labor on Sunday, is in favor of works of necessity. It will be seen by the reading of the statute that it also creates an exception in favor of works of charity.

"Every person who shall either labor himself, or compel or permit his apprentice, or servant, or any other person under his charge or control, to labor or perform any work, other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of

hunting game or shooting on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars." R. S. 1892 sec. 1578.

It is a rule of appellate procedure that a case can not be tried upon one theory, and determined in the appellate court upon another theory. But the rule has no application to cases where the judgment of the trial court is affirmed for reasons other than those on which the trial court proceeded; for, although the trial court has given the wrong reason for the right judgment, the judgment is not to be reversed if it is supported by good reasons, and if it is an application of the law to the undisputed facts. If, therefore, the sending of this message was, under the circumstances disclosed by the evidence, a work of charity, it was not labor or work prohibited by the statute above quoted, although it may not have been a work of necessity.

But we think that it was a work of necessity. The undisputed evidence shows that it was intended to advise the plaintiff's wife of his whereabouts, and of the time of his arrival at home, after he had been absent from home for two days, a portion of his absence being protracted and unexplained to his wife, in order to allay any anxiety on her part as to his whereabouts and safety. It also shows that this fact was communicated to the agent of the defendant, who received the dispatch. We are of opinion that this was a work of necessity within the meaning of the statute. In Massachusetts, where the court has gone as far, perhaps, as any court in the Union in upholding laws against what is called Sabbath-breaking, it has been said: "By the word 'necessity' in the exception, we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor, done under the circumstances of any particular case, may well be deemed necessity within the statute." *Flagg v. Inhabitants of Millbury*, 4 Cush. (Mass.) 243. We think that the common sense of those who are most rigorously in favor of Sunday observance would unite in saying that the sending of a message to a man's wife and family under such circum-

stances, where he had been from home an unexplained and unaccountable length of time, for the purpose of allaying anxiety as to his whereabouts, would be regarded as a work of necessity.

But, if it is not a work of necessity, we think that it must be pronounced a work of charity. The word "charity" is derived from the Latin "*carus*," which means "dear, costly, loved." Among the definitions of the word given by Webster are "love," "benevolence," "good will," "any act of kindness or benevolence." Among the synonyms given by the same lexicographer are "love," "benevolence," "good will," "affection," "tenderness." In many places in the New Testament, where the word "charity" is used in the old version, the word "love" is used in the more accurate translation of the new version. See, for instance, 1 Corinthians, 13, *passim*. The word, as used in the statute, is intended to be understood in its ordinary sense, and to denote something more than mere alms-giving; and it is plain that an act intended by a husband to allay anxiety and distress of mind on the part of his wife and children may be performed or procured to be performed on Sunday as a work of charity, without violating the statute above quoted.

Then, as to the view which the trial court took, that the necessity which will authorize the doing of work on Sunday "may be a necessity arising from inadvertence on the part of the person pleading the necessity, but not from wilfulness," we think that that is the correct view. We also think that the court rightfully refused the instruction tendered by the defendant, that "if the plaintiff neglected to send a similar dispatch or similar information on the preceding day, and, by such neglect on his part, created the necessity for sending it on Sunday, he cannot recover." We must here recur to the view that the necessity is not a *physical* but *moral* necessity. If a husband absents himself from his wife and family beyond the promised length of time, and neglects on Saturday to send them information of his whereabouts and the time of his return, he is clearly

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under the moral duty of sending such information on Sunday, and this moral duty which he owes to them creates a necessity within the meaning of the statute. The duty and the necessity exist, although the circumstances creating them may have been the result of his previous negligence.

But even if the plaintiff's negligence may have created this necessity, we do not see how such negligence could be regarded as rendering it improper for him to perform the duty, and for the defendant to assist him in its performance, if it was a work of *charity*. Can anyone say that a man's negligence on Saturday to perform a work of charity will render it the less obligatory upon him to perform it on Sunday?

We may, perhaps, take even a broader view of the case. Here is a telegraph company which, no doubt, keeps its principal offices open every Sunday in the year, presumably for the sending of messages which relate to works of necessity or charity, and which may, therefore, lawfully be sent. Its operatives are on duty. They receive a message of the kind in question, and accept the regular fee for transmitting it. Upon what principle is public justice advanced, or the cause of morality or religion subserved, by allowing them to take the money of the customer, neglect to send his message, and then plead, what is a mere *after-thought*, that the message was tendered to it on Sunday? Does anyone suppose that this company has refused to receive and transmit a single telegraphic message on Sunday during the past year, when its operatives were on duty and its lines in order? Could a jury be assembled in Missouri that would fine it for sending such a message as the one in question, if it were indicted therefor under section 1578 of the Revised Statutes of 1879? These observations are thrown in to indicate the wide departure from common sense, and from the ordinary habits of thinking of the people, which would be involved in a decision upholding such a defense.

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The judgment will be affirmed. Judge Briggs concurs.
Judge ROMBAUER concurs in the result.

NOTE.—See INDEX to this and to previous volumes, title "Sunday Contract."

See note to next case.

J. P. BRASHEARS, Respondent, v. THE WESTERN UNION
TELEGRAPH COMPANY, Appellant.

St. Louis Court of Appeals, May 12, 1891.

(45 Mo. App. 433.)

ERROR IN TELEGRAM.—MISSOURI PENAL STATUTE.—LIMITING LIABILITY.—
DELIVERY BY TELEPHONE.—FREE DELIVERY LIMITS.

Under the statute, Missouri R. S. of 1879, section 883, imposing a penalty of \$100, in behalf of the sender, for neglect or refusal by telegraph companies to transmit dispatches with impartiality and good faith, transmission includes delivery to the addressee.

The contract of a telegraph company with the sender of a message includes the delivery thereof in writing to the addressee. Delivery by telephone does not fulfil the contract, and in case of error in delivery by telephone the company becomes liable for the statutory penalty.

The addressee is not the agent of the sender, so that he can waive delivery as contracted for.

The company is not excused by the fact that the brother of the addressee, with whom he lived, had instructed the company to deliver no telegram at his house on Sunday (on which day the message in question arrived), it not appearing that the sender knew of such instruction.

It is incumbent upon the company, in order to avail itself of a local rule at the terminal office, requiring extra compensation for delivery beyond a certain distance, to notify the sender of such regulation.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Henderson*, ante, p. 570.

APPEAL from the Monroe Circuit Court.

Charles E. Yeater, for appellant.

R. B. Bristow, for respondent.

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Briggs, J.: On Sunday, the twelfth day of May, 1889, the plaintiff delivered to the defendant's agent at Monroe City the following telegraphic message, to be transmitted over the defendant's line and delivered by it to the addressee in the city of Hannibal :

"5-12-'89.

"*S. J. Harrison, Hannibal, Mo.:*

"Come up ; my boy is dead ; funeral at three o'clock.

"J. P. BRASHEARS."

It is conceded that the dispatch was promptly and correctly transmitted over the wires, and was received at Hannibal at 9.38 A. M. Upon the receipt of the message the defendant's agent in charge of its Hannibal office, instead of sending the dispatch to the addressee by a messenger, attempted to communicate it to him, through a telephone. The court found as a fact that, instead of the dispatch sent, the addressee received the following :

"PALMYRA, Missouri, May 12, 1889

"*Mr. Samuel J. Harrison, Hannibal, Mo.:*—

"My boy died last night at three o'clock. Please come up.

"[SIGNED.]

C. J. HEIBEL.

The plaintiff claims that the failure of the defendant to deliver the message was a violation of section 883 of the Revised Statutes of 1879, then in force, and the present action is to recover the penalty provided for in the section. The cause was submitted to the court without the intervention of a jury, and the finding and judgment were for the plaintiff. The defendant has appealed.

At the request of the defendant the court, under section 2135 of the Revised Statutes of 1889, stated in writing its conclusion of the facts. This statement is quite full and satisfactory, and we have concluded to set it out in full in this opinion.

"In this cause, under section 2135 of Revised Statutes of 1889, the defendant requests the court to state in writing the conclusion of facts found by the court.

"Generally the court finds that by the greater weight of evidence, to the reasonable satisfaction of the court, the plaintiff has sustained the averments of his petition.

"The court finds that, as a work of necessity and charity, the telegram alleged was prepaid and sent on Sunday.

"The court finds that said telegram duly reached the defendant's operator at Hannibal. But the court finds that said telegram was never delivered to the person addressed, and that, in failing to deliver the same as prescribed in the next to the last sentence in the printed heading of said telegram, the defendant was guilty of neglect, and simply neglect.

"There was on the part of defendant no want of impartiality, and no want of good faith. Prior and up to, and at, the time complained of, there existed in the city of Hannibal, Missouri, a telephone system with one private wire thereof extending to the telegraph office of the defendant on the corner of Main and Broadway streets, and another private wire thereof, extending to the private residence of Mr. G. M. Harrison, and a public wire thereof extending to Palmyra, Missouri. From the testimony of the office employees of the defendant's Hannibal office it is found that, prior to the time complained of, Mr. G. M. Harrison had orally and in writing on file in said office notified and ordered said employees not to deliver written telegrams at his home on Sunday. Mr. G. M. Harrison was a practising attorney at law, and he was the attorney of Mr. Charles J. Heibel, who had a son under sentence in the jail at Palmyra, Marion county, Missouri. This son was understood to be in delicate health, and on said grounds a pardon had just been secured by Mr. George M. Harrison as said attorney. The latter's brother, Mr. Samuel J. Harrison, was a justice of the peace at Hannibal, Missouri, and Mr. Samuel J. Harrison was by marriage an uncle of plaintiff's. He had in former years been a near neighbor of plaintiff, and between him and plaintiff friendly relations subsisted. At the time of the telegram

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Mr. Samuel J. Harrison made his home at the residence of said brother, and he was aware of the proceedings in the case of C. J. Heibel's son. The plaintiff resided at Monroe City, Monroe county, Missouri, where on Saturday, May 11, 1889, the plaintiff's infant child died. On that day plaintiff sent several telegrams, giving notice of the bereavement, but by inadvertence the plaintiff omitted to advise Mr. Samuel J. Harrison until Sunday morning following.

"The regular train of the Missouri, Kansas & Texas Railroad Company was expected to leave Hannibal for Monroe City late in the forenoon of said Sunday. Early on said Sunday morning, the plaintiff duly paid for and forwarded through the agent of defendant at Monroe City, addressed to Samuel J. Harrison, a telegram under defendant's printed stipulations, all in words and figures as follows:

"5-12-89.

"*S. J. Harrison, Hannibal, Mo.:*

"Come up; my boy is dead; funeral at three o'clock.

"J. P. BRASHEARS."

"The defendant had no wire to Hannibal. Its communication with Hannibal was through either Quincy or Kansas City and St. Louis. Quincy failed to respond, but the dispatch was, *via* Kansas City and St. Louis, received at the defendant's Hannibal office by nine o'clock the same Sunday morning. The Hannibal operator called up the telephone number for the residence of George M. Harrison. The latter's daughter, a bright and intelligent girl of fourteen [twelve] years, answered the telephone call, and through the said instrumentality she learned that a telegram of S. J. Harrison was to be communicated. The latter was in his room preparing his toilet, and he told his niece to receive the telegram through the telephone. She received it, and reported it in words and figures as follows:

"PALMYRA, Missouri, May 12, 1889.

"*Mr. Samuel J. Harrison, Hannibal, Mo.:*

"My boy died last night at three o'clock. Please come up.

"C. J. HEIBEL."

“Observing that the alleged telegram was signed by C. J. Heibel and that it was from Palmyra, and being nowise concerned therein, Samuel J. Harrison regarded said telegram as intended for his brother, and gave it no further attention. Mr. S. J. Harrison did not go to Monroe City. Not till after the interment did he learn of the Monroe City message. Mr. Heibel's son survived the whole transaction. At the time involved, the residence of Mr. George M. Harrison was within the city limits, though over ten blocks distant from the defendant's Hannibal office, and a street car line was in operation from the site of said office to the site of said residence. At said time, the defendant had an office regulation, affording free delivery to any point in the city within ten blocks of said office, and requiring the addressees within the city limits, and over ten blocks from said office, to pay an extra charge.

“This was a very reasonable regulation, but it was not in the telegram heading, and the plaintiff had no knowledge thereof and no reason to be informed thereof, and, therefore, it is found to be no part of the contract with plaintiff, and not applicable to plaintiff's case.

“The defendant's contract in this case was not of that character which is the product of mutual negotiations or adjustment, but an inflexible printed form arbitrarily tendered by the defendant. This paper contains no stipulations authorizing defendant to transmit by or through the telephone. There is no testimony tending to show that the plaintiff authorized the transmittal by telephone.

“It is found that the use of telephonic connections in intra-urban service practically amounts to a collateral disclosure of the contents of a private telegram. And so far it was negligence *per se*.

“It is also found that such telephonic communication at the time involved was hazardous and unreliable. The court further finds that there was no tender of the telegram.

“Thereupon, in the respects shown by the said findings, the court finds that the defendant was guilty of negligence.”

The finding also set out the printed regulations of the company's message blank which contained, among other things, the following :

And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company, when necessary to *reach its destination*. * * * Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery.

It is insisted by the defendant's counsel that section 883 of the Revised Statutes of 1879 has application only to the transmission of messages by electric telegraph between the sending and receiving offices, and that, as the statute is penal, it cannot be so enlarged by construction as to include the act of *delivery*, which is accomplished through a different agency. The section reads :

It shall be the duty of every telephone or telegraph company, incorporated or unincorporated, operating any telephone or telegraphic line in this State, to receive dispatches from and for other telephone or telegraph lines, and from and for any individual, and on payment or tender of their usual charges for transmitting dispatches, as established by the rules and regulations of such telephone or telegraph line, to transmit the same with impartiality and good faith, under a penalty of \$100 for every neglect or refusal so to do, to be recovered, with costs of suit, by civil action, for the benefit of the person or persons or company sending or desiring to send such dispatch.

The defendant's construction of the statute is too narrow, and does not meet the evident intention of the law. The word "transmit" was intended not only to embrace the transmission of messages over the wires, but it necessarily includes the prompt delivery of all telegraphic communications. The electric telegraph is an expeditious mode of communicating intelligence, and by reason of this it has become an indispensable agency in conducting the commerce of the world. By reason of the great advantages to be derived from rapid communication, telegraph companies charge much more than would be required to transmit the

same intelligence through the mails. Hence the Legislature deemed it important, and not unreasonable, to impose a penalty on such companies for a failure to conduct their business with that dispatch and celerity which the public has a right to expect. This would certainly include the prompt delivery of messages, for it would be of little consequence to have them promptly sent over the wires, if the companies could take their own time in making deliveries. If the defendant's construction of the statute were adopted, it would be well to repeal it altogether, because it would be next to an impossibility for the sender of a message to prove that the delay was in the transmission and not in the delivery. We think that the argument of the defendant's counsel on this question is unsound.

The next position taken by the defendant is that, under the contract with the plaintiff, it was not bound to make a physical delivery of the message by a messenger, and that it properly resorted to the telephone. We are of the opinion that this proposition cannot be successfully defended. Now let us examine into the nature of a contract between a telegraph company and the sender of a message. A telegraph company contracts with the sender to transmit the words of his message over its wires to the place of destination, and *there make a copy and deliver it to the addressee*. In making the copy, and in its delivery, the company acts as the agent of the sender. In treating such a contract Mr. Gray in his work on Communications by Telegraph, page 182, said: "A telegraph company does not, as the government does, undertake to transport and deliver the paper upon which the employer writes the intelligence that he wishes to have communicated. It undertakes to transmit, with the aid of electricity, the intelligence contained in that paper to the place of destination, and there to *write it out and deliver it to the person addressed*." This is undoubtedly the usual undertaking of a telegraph company, and in the absence of a special contract to the contrary, anything short of it would be a failure of duty to the sender. The latter has the right to expect and

demand that a copy of the message be promptly delivered to the addressee in person, if he is accessible. It follows that the attempted delivery of the message to Mr. Harrison through a telephone was not authorized by the contract between the plaintiff and defendant. If we were dealing with a case, where the transmission of the message to its destination required the use of a telephone, quite a different question would be presented. Such a case might come under, and be governed by, section 884 of the statute. This question, however, is not before us for decision, and we do not wish to be understood as passing on it. We merely make the observation to show that the argument made by the defendant's counsel on this section of the statute is not applicable to this case. Here the transmission by electric agencies had been completed, and nothing remained but a physical delivery of the message to the addressee.

But the defendant seeks to escape the penalty imposed by the statute upon the ground that the addressee waived the right to have the message delivered in writing. This argument might be good, if the addressee was suing for special damages on account of the failure to so deliver, but it is no argument against the plaintiff's right of recovery of the penalty. The addressee was not his agent for the receipt of the message, and none of his legal rights could be waived by him, in view of the fact that the right of action for the penalty is under the statute in the sender alone. In this connection it may not be out of place to say that the alleged negligence of the addressee in directing a girl of twelve years of age to receive the message could in no way affect the plaintiff's right of recovery. If the message had been properly tendered, and the addressee had refused to receive the same, then the defendant would have done all it agreed to do.

It is next insisted that the defendant was excused from making a physical delivery of the message, because the brother of the addressee had instructed the defendant's agents not to deliver messages at his house on Sunday. There is no evidence that the plaintiff was advised of this.

If he was ignorant of the fact, we are unable to conceive how his contract with the defendant could be affected by it. If the addressee were suing, it might be that the defendant, as to him, would have been justified in waiting until the next morning to make the delivery.

Lastly, it is contended that the defendant ought not to be subjected to this prosecution, because the addressee lived outside of the free delivery limits in the city of Hannibal, and that the plaintiff failed to pay the extra charge for making the delivery. We are of the opinion that this presents no defense to the action, because there is no evidence that the plaintiff knew the extent of the free delivery limits in the city of Hannibal. He probably knew where the addressee lived, and, if he did, he also knew that the place could be readily reached by a street railway leading directly from the defendant's office. Hence, there was nothing to suggest to him that he ought to provide for a special delivery.

On this point the defendant relies on the case of *The Western Union Tel. Co. v. Henderson*, 30 Am. & Eng. Cor. Cases, 615, in which the Supreme Court of Alabama held that, under the contract, the law imposed the duty on the sender of a message to know whether or not the addressee lived within the free delivery limits at the place of destination, and that, if he lived outside, it was the duty of the sender to notify the company, and pay the extra charge for delivery. We are not prepared, nor is it necessary for us, to adopt that view of the law. In its facts that case is different from this. There it appeared that the company had, by a general regulation, established the free delivery limits within a radius of half a mile from its office in all places having the population that Grand Bay had, which was the place of destination. In the present case the court found that the defendant had an office regulation at Hannibal, which confined the free delivery of messages in that city to within a radius of ten blocks from the office. It would, in our opinion, be quite unreasonable to expect the plaintiff to be advised of such a regulation. It

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would be much more reasonable to require the defendant's agents to notify a sender of a message of the free delivery limits applicable only to the place of destination.

* * * * *

Our conclusion is that the judgment in this case is for the right party. It will, therefore, be affirmed. All the judges concur.

NOTE.—For earlier Missouri cases, see *Thompson v. W. U. Tel. Co.*, vol. 2, p. 684, and note to same.

In *Julius D. Abeles v. W. U. Tel. Co.*, St. Louis Court of Appeals, Nov. 19, 1889 (87 Mo. App. 544), held, that in case of delay of a cipher dispatch, the contents of which were not made known to the telegraph company, nominal damages only can be recovered, unless the delay were so great as to amount substantially to failure to deliver at all; in which case the measure of damages is the sum paid for transmission, with interest thereon. And the following cases of this series were cited with approval: *Candee v. W. U. Tel. Co.*, vol. 1, p. 99; *Daniel v. W. U. Tel. Co.*, vol. 1, p. 650. Cited with disapproval: *W. U. Tel. Co. v. Reynolds*, vol. 1, p. 487; *W. U. Tel. Co. v. Way*, vol. 2, p. 455; *W. U. Tel. Co. v. Hyer*, vol. 2, p. 484.

Said case was followed, as to measure of damages, in *E. P. Barrett v. W. U. Tel. Co.*, St. Louis Court of Appeals, Dec. 9, 1890 (42 Mo. App. 542), in which also the following principles were decided:

A stipulation in a telegraph blank that "no claim for damages shall be valid unless presented in writing within thirty days after sending the message" does not apply where the message was not dispatched at all.

The sender having established delivery for transmission and non-delivery to the addressee, the burden is upon the company to prove that the message was "sent," that is, started from the transmitting office.

The injury alleged being loss of market for cattle, and the plaintiff's pleading referring only to certain cattle shipped to St. Louis, he could not properly prove loss on those shipped elsewhere.

D. KEMP V. THE WESTERN UNION TELEGRAPH COMPANY.*Nebraska Supreme Court, Feb. 4, 1890.*

(28 Neb. 661.)

ERROR IN TELEGRAM.— DAMAGES.— LIMITING LIABILITY.

(Head-note by the court):

One P delivered a message to a telegraph company at its office at Papillion, in this State, to be delivered to a person named at Kansas City, Mo. The message as transmitted was incorrect, whereby P lost a promised situation, and sustained damages. *Held*, that the company was liable for the damages.

Section 12 of the act relating to telegraph companies makes such a company "liable for the non-delivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ," etc., and provides that it shall not be exempted from any such liability by reason of any "clause, condition, or agreement contained in its printed blanks." Such requirements are reasonable, and are binding on all telegraph companies in the State.

Where a telegraph company undertakes to transmit a message correctly to another State, and fails to do so, it is liable for a breach of its contract, and the party injured may recover all the damages which he sustains by reason of such breach.

Case of this series cited in opinion: *Telegraph Co. v. Pendleton*, vol. 1, p. 682.

William V. Allen and John S. Robinson, for plaintiff in error.

H. C. Brome, contra.

MAXWELL, J.: This action was brought by the plaintiff against the defendant in the District Court of Madison county, to recover damages for the breach of an alleged contract. It is averred in the petition: "That on the first day of November, 1886, the said defendant owned, controlled and operated a line of telegraph wire from Papillion, in the State of Nebraska, to Kansas City, in the

State of Missouri, with offices in each of said places in charge of duly authorized agents, at which offices it held itself out to the public to receive and deliver telegraphic messages for hire; and on said date the plaintiff delivered to the defendant, at its office in said Papillion, for immediate transmission and delivery at Kansas City, Mo., a message in the words and figures as follows, to-wit:

“ Nov. 1, 1886.

“ *To J. C. Robertson, Coates House, Kansas City:*

“ Am on my way, Missouri Pacific, Kansas City. Arrive eight to-night.

“ D. KEMP.”

which the said defendant then received from the plaintiff, and agreed to promptly and correctly transmit and deliver to the said J. C. Robertson, at the Coates House, Kansas City, Mo., without delay. That the plaintiff then paid the defendant's duly authorized agent the sum of sixty-five cents for such services, which was accepted by him as full compensation therefor. That at said time this plaintiff had an engagement to meet said J. C. Robertson, the person to whom said message was sent, at the Coates House, Kansas City, Mo., at the hour of 8 o'clock P. M., on said day, to contract with him, as general agent of the Texas Land & Cattle Company, to enter the service of said company on a salary. That, if plaintiff made said contract of employment, he was compelled to leave said Kansas City that evening at 9 o'clock P. M., to enter upon the discharge of his duties as employee of said company; and, if he did not reach said Kansas City by 8 o'clock P. M., said Robertson was at liberty to hire another man for said situation. That said defendant so carelessly and negligently transmitted said message that when it was delivered to said J. C. Robertson, at said Coates House, Kansas City, Mo., by the defendant, it read that the plaintiff would reach Kansas City at 10 o'clock that night; making plaintiff's arrival there too late to transact said business. That said message was delivered in the condition last above stated; and, in consequence of its reading

NEBRASKA, 1890.

Kemp v. Telegraph Co.

that plaintiff would arrive at Kansas City, Mo., o'clock that night, the said J. C. Robertson employed another man for said Texas Land & Cattle Company. That the plaintiff was deprived of said employment, and profit of said proposed contract. That the plaintiff entirely without fault or neglect himself. That the plaintiff expended in money, in going to and returning from Kansas City to see said Robertson, the sum of fifty dollars, and lost six days' time, of the value of thirty dollars, and was deprived and prevented from making said contract employment, all to his damage in the sum of \$200, said sum is now due the plaintiff from the defendant wholly unpaid; and plaintiff prays judgment against said defendant for the sum of \$200, with interest and of suit."

To this petition the defendant answered, in effect, there was a condition printed on the blanks furnished on which to send messages which provided that the company should not be liable for "mistakes or delays in transmission of any unrepeated message whatever, having arising from the negligence of its servants or otherwise, beyond the amount received for the sending of the same," and fixing the liability "for mistakes or delays in transmission or delivery, or for non-delivery, of a repeated message, beyond fifty times the sum received for the transmission of the same, unless specially insured, nor, in any case, for delays arising from unavoidable interruption in the working of its lines, or for errors in copying or obscure messages," etc. Also, that the company will be liable for damages in any case where the claim is presented in writing within sixty days after the sending "of the message."

On the trial of the cause the court instructed the jury "that, under the law, and the agreed statement of facts herein, the plaintiff cannot recover beyond the amount paid for sending said message, which it is agreed is the sum of 65 cents." The jury returned a verdict as directed;

motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony tends to sustain the allegations of the petition.

The point in the answer as to the limitation of time in which to bring the action is not referred to in the brief of either attorney, and therefore will not be noticed. Section 12 of chapter 89a of the Compiled Statutes provides that

Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the non-delivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law; and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks.

The defendant is a corporation existing in this State, and having offices at various points therein for the transaction of business; and that business is the transmission, for hire, of messages from points within the State to points on its line within or without the State. It is a common carrier of messages, the agent for the transmission of which is electricity. The agent used in the transmission, however, is not material. Suppose the defendant undertook to carry in wagons or other vehicles messages or packages, and under such employment, for the plaintiff at Papillion it received the message in question to be delivered at Kansas City, and if it failed to deliver the same it would thereby fail to perform its agreement, and would be liable for any damages which the party sending the message might thereby sustain. Why should not the same rule apply where the message is sent by electricity?

The value of a message depends upon its correctness. If it is changed in any material part, it is not the same message as that delivered for transmission, and may materially affect the rights of both the person sending it and the person receiving it. Experience has shown that messages can be correctly transmitted from point to point both within

and without the State, and where due care is used mistakes can be avoided. The rule seems to be that messages are correctly transmitted.

The Legislature of this State, recognizing these facts, in 1883 passed an act in regard to the telegraph companies within the State, the 12th section of which makes the company liable for the non-delivery of dispatches delivered to its care, "and for all mistakes in transmitting messages made by any person in its employ," etc., and declared that it "shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks." This is a reasonable requirement; and, as the telegraph company is bound by the law of the State as much as any inhabitant thereof, the statute in question becomes a part of the contract. That is, the telegraph company cannot ignore the law, and set itself up as superior to it, but must obey it, and transmit messages correctly or be liable for its failure in that respect. This is conceded as to business in the State, but it is claimed that it does not apply to messages transmitted out of the State.

The contract was made at Papillion, within this State; and there the defendant undertook to transmit correctly the message to Kansas City. It did not do so. The contract of the defendant, therefore, was broken, and the plaintiff thereby sustained damages. The place where part of the service was to be performed can make no difference. The contract was made here, and was to be in part performed in this State; and the defendant is liable for the breach thereof.

We are referred to the case of *W. U. Tel. Co. v. Pendleton*, 7 Sup. Ct. Rep., 1126, as establishing a different rule. In that case, the statute of Indiana provided for a penalty of \$100 in certain cases of failure of a telegraph company to perform its duty. A message was transmitted from Indiana to a point in Iowa, and the company there failed to deliver the same. The action was brought to recover the penalty, and the United States Supreme Court held that it could not be enforced. In other words, that the penal

laws of a State do not extend beyond its boundaries, and therefore, on the failure of the company to perform its duty in Iowa, it did not become liable to the penal laws of Indiana.

The above decision, no doubt, is correct; but it can have no application here. In the case at bar, the contract entered into by the defendant to transmit the plaintiff's message correctly, and for which it had received its pay, was broken. He has thereby sustained damages. These damages are the natural result of the breach of the contract, and are not penal in their nature. If recovered, they are merely to compensate the plaintiff for the injury sustained by him from the wrongful act of the defendant. Such damages may be recovered.

The precise question here involved was recently before the United States Circuit Court of this State, in *Oppenheimer v. W. U. Tel. Co.*, and Judge DUNDY held that the company was liable; and we so hold.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

The other judges concur.

NOTE.—This case is cited in the following case.

See INDEX to this and preceding volumes, titles "Limiting Liability," "Damages;" also "Notes" on said subjects.

For earlier Nebraska cases, see note to next case.

**WESTERN UNION TELEGRAPH COMPANY v. THOMAS W.
LOWREY.***Nebraska Supreme Court, Sept. 15, 1891.*

(32 Neb. 782.)

**DELAY OF UNREPEATED TELEGRAM.—NEBRASKA STATUTE.—DAMAGES.—
TIME TO PRESENT CLAIM.**

By statute, in Nebraska, the usual stipulation in telegraph blanks, limiting the liability of the company as to unrepeatd messages, is void.

Independent of this, it would not apply to a case where the message was correctly transmitted to the terminal office and transcribed there.

A telegram of a specified form held of itself sufficient to apprise the company of the importance of prompt transmission.

Evidence in a given case held sufficient to show substantial compliance with condition limiting time to present claim for damages.

Cases of this series cited in opinion : *Gulf, &c. Ry. Co. v. Miller*, vol. 2, p. 781 ; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815 ; *W. U. Tel. Co. v. Way*, vol. 2, p. 455 ; *W. U. Tel. Co. v. Tyler*, vol. 1, p. 115 ; *W. U. Tel. Co. v. Henderson*, vol. 3, p. 570 ; *Kemp v. W. U. Tel. Co.*, vol. 3, p. 711 ; *Becker v. W. U. Tel. Co.*, vol. 1, p. 387.

ERROR to District Court, Lancaster county. Appeal by defendant below.

Pound & Burr, for plaintiff in error.

John P. Maule and *U. M. Parker*, *contra*.

NORVAL, J. This action was brought in the court below by Thomas W. Lowrey against the Western Union Telegraph Company to recover damages for failure to transmit and deliver a message within a reasonable time after its receipt.

Upon a trial to a jury, verdict was returned for the plaintiff for the sum of \$206.09 principal and \$21.03 interest. From a judgment thereon the defendant prosecutes a petition in error.

There is no controversy upon the facts. On the 29th day of June, 1888, the defendant in error had 54,953.22 bushels of corn in the possession of Norton & Worthington, commission merchants in the city of Chicago, which he desired them to sell for him, and on that day, at 12 o'clock noon, Lowrey delivered to the plaintiff in error, at its office in the city of Lincoln, Nebraska, to be immediately transmitted and delivered to Norton & Worthington, in the city of Chicago, the following message :

6—29—1888. To Norton & Worthington, Chicago, Ill.: Sell all corn you have in store, and telegraph how many cars you sell, and sell balance on arrival.
THOMAS W. LOWERY.

The telegraph company and Norton & Worthington each had an office in Chicago, in the same building. When the message was delivered to the company, the sender informed the operator that it was important, and that it must be sent and delivered at once. The message was not delivered to Norton and Worthington until 2 o'clock and 25 minutes in the afternoon of the same day, which was too late to make the sale that day. To have enabled them to sell the corn on June 29th it was necessary that the dispatch should have reached the sendees from three to five minutes before 1 o'clock of the afternoon of the same day. The evidence shows that the usual time required to send a message from Lincoln to Chicago is ten minutes, and had the dispatch been promptly sent and delivered, it would have been received by the commission merchants in time to have sold the corn on June 29th. But the message being received by them after the close of the corn market, Lowrey's corn was not sold until the next day, at which time the market declined, so that he received for the corn \$206.09 less than it would have brought had it been sold the previous day. No testimony was offered by the defendant, on the trial, to excuse the delay in transmitting and delivering the message. The blank upon which the dispatch was written contained the following printed condition :

Errors can be guarded against only by repeating a message back sending station for comparison, and the company will not hold itself for errors or delays in transmission or delivery of unrepeatd message beyond the amount of tolls paid thereon, nor in any case when the message is not presented in writing within sixty days after sending the message.

Lowrey did not order the message repeated, and for reason it is contended by the company that, under above stipulation, it is not liable beyond the amount for sending the message.

The defendant requested the court to instruct the jury "that, if they believe from the evidence that the plaintiff had notice and knowledge of the contents and terms printed on the blank on which the message was written at the time he delivered or caused the same to be delivered to the defendant, and if the jury further find from the evidence that the plaintiff, at the time he delivered or caused the message to be delivered to the defendant, did not order the same to be repeated, that then and in that case the plaintiff can only recover for the delay in the transmission of the message the amount paid by him to the defendant for sending said message."

The instruction was refused, and the court charged the jury to the effect that, if they found there was no agreement between the plaintiff and defendant as to the company's liability for delay in the transmission and delivery of the message, outside of the printed condition on the blank on which the telegram was written, then they should entirely disregard said printed stipulation, and give it no weight in the consideration of the case. We do not think the court erred in refusing to charge the jury as requested by the defendant, and in instructing that the stipulation on the printed blank was no defense to the action. The message, although not repeated, was correctly transmitted by the operator in Chicago, and accurately transcribed by him. Nothing more could have been accomplished had the message been repeated to the sending office. It certainly could not have expedited its delivery.

The stipulation referred to, limiting the defendant's liability

ity, is no defense to the suit. *Railway Co. v. Wilson*, 69 Tex. 739, *W. U. Tel. Co. v. Broesche*, 10 S. W. Rep. (Tex.) 734; *Telegraph Co. v. Way*, 83 Ala. 542, *White's Case*, 14 Fed. Rep. (Kan.) 710; *Tyler's Case*, 74 Ill. 168; *W. U. Tel. Co. v. Henderson*, 7 South Rep. (Ala.) 419; *Gulf, C. & S. F. R. Co. v. Miller*, 7 S. W. Rep. (Tex.) 653.

Again, the printed stipulation on a telegraph blank, limiting the liability of a telegraph company unless the message is repeated, is no defense to an action for damages for delay in delivering an unrepeatd message.

Section 12 of chapter 89a of the Compiled Statutes of this State provides that "any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for the non-delivery of dispatches entrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks." Under the provision of this section the printed condition on the telegraph blank limiting the liability of the telegraph company for mistakes or delays in the transmission or delivery of unrepeatd messages is void. *Kemp v. W. U. Tel. Co.*, 28 Neb. 661.

The case of *Becker v. Western Union Telegraph Co.*, 11 Neb. 87, which held that a telegraph company had the right, by reasonable regulations relative to sending messages, to limit its liability for errors not occasioned by the negligence of its employees, was decided before the above section was passed by the Legislature, and the rule announced in that case is not applicable to the case at bar.

It is contended by the plaintiff in error that the provisions of section 12 are not within the title of the act, and are, therefore, in conflict with section 11, article 3, of the Constitution, which provides that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." This position is unsound. The act is

entitled "An act to prohibit extortion and discrimination in the transmission of telegraphic dispatches." The title is broad and comprehensive enough to cover every act of extortion or discrimination by telegraph companies, and the object and purpose of the section in question is germane to the title of the act. It runs through the entire act that telegraph companies are required, with impartiality, and without discrimination, to use due diligence in the transmission and delivery of dispatches, and the rates must be uniform for the same service. . In furtherance of that object, section 12 was adopted by the Legislature, making telegraph companies liable for all damages resulting from the failure to correctly and promptly transmit and deliver telegrams entrusted to their care, and prohibiting them from limiting their liability by printed conditions on message blanks. If telegraph companies were permitted by printed stipulations, to limit their liability for mistakes or delays in the transmission or delivery of unrepeatd messages, the same care and diligence would not be exercised in forwarding them as is bestowed upon repeated messages, where their liability is not limited. To prohibit telegraph companies from discriminating between its patrons was one of the purposes of the section in question, and, the object of the section being embraced by the title of the act, of which it is a part, it is not repugnant to the section of the Constitution above quoted.

It is insisted that the court erred in refusing to give to the jury the defendant's eighth request, which is as follows: "The court instructs the jury that, if they find from the evidence that the defendant received said message without notice or knowledge of any fact indicating that it was important to the plaintiff that said message should be transmitted to Chicago before 1 o'clock of the same day on which it was delivered to the defendant, or that any special damage would or might result from a failure to transmit said message to Chicago before 1 o'clock of said day, then the defendant is not liable to the plaintiff for any damage resulting to the plaintiff in consequence of said message not

reaching Chicago before 1 o'clock of said day, beyond the price paid by plaintiff to the defendant for sending said message."

There was no error in refusing to give this charge to the jury. It assumes that there was evidence before the jury from which they could find that the company received the message without notice that it was important and should be transmitted promptly, when there was no such evidence. On the contrary, it is undisputed that the plaintiff informed the operator at Lincoln, when the message was received, that it was important, and to "rush it." Besides, the language of the message was, of itself, sufficient to indicate to the operator the urgency of the dispatch, and the necessity of its prompt transmission and delivery. The company having failed to transmit and deliver it in due time, it is liable for the damages naturally and proximately resulting from such failure, which would be the depreciation in the market value of the corn between the time the dispatch should have been delivered to the sendees and the following day, when the corn was sold. * * *

Conceding that the plaintiff should have presented his claim for damages in writing to the defendant, within sixty days after the message was sent, as required by the printed conditions on the blank on which the dispatch was written, as claimed by the company, but which we do not decide, yet we think the evidence shows a substantial compliance with the clause referred to.

H. C. Mahoney testified, in effect, that he was the manager of the Western Union Telegraph office in Lincoln in July, 1888, and received from Mr. Maule, one of the plaintiff's attorneys, a written demand for a settlement of the loss claimed by Mr. Lowrey by reason of the delay in delivering the telegram in question, and in response he sent the following letter :

"LINCOLN, Neb., July 24.

J. P. Maule, Esq., Att'y at Law, Lincoln :

Dear Sir : Your letter of July 19th received. The matter is being investigated. Please furnish particulars as to how Mr. T. W. Lowrey suffered a loss of \$206.09, as alleged.

H. C. MAHONEY."

The above was all the testimony introduced on the subject. While neither the written claim, which was presented to the company, nor a copy of it, was produced on the trial, nor was parol evidence of the contents of the writing given, yet it does appear that a written demand of some kind was made for the payment of the loss, and the company's answer thereto shows that it was for the exact amount claimed in this action. This was sufficient and no other or further proof was necessary.

There is not the slightest foundation in the evidence upon which to base the charge that the plaintiff was guilty of contributory negligence. While he telephoned the message from his place of business in Lincoln to the telegraph office, that was his usual custom, and the defendant made no objections thereto. But it is said that it was telephoned at noon, while the whistles were blowing, and it is unknown whether the operator heard what was said about the message being important. He seems to have understood correctly the message, and he fails to testify that he did not hear what was said about "rushing" the dispatch through. Even had nothing been said by the sender upon that subject, yet, as already stated, the language of the message was sufficient to indicate to every operator through whose hands it passed the necessity of its speedy transmission and prompt delivery to the sendees, and that damages might result from any failure or neglect in the performance of the duty assumed by the company. The plaintiff was not negligent in delivering the message at Ziemer's office, which was a branch office, nor in not having it repeated from Chicago. The defendant assumed to receive and transmit messages from the office where this one was delivered for transmission, and it was bound to discharge the obligation thus assumed with reasonable care and diligence, and that, too, notwithstanding the message was not ordered repeated. The verdict was for the actual damages sustained by the plaintiff resulting from the defendant's omission of duty.

The judgment is

AFFIRMED.

The other judges concur.

NOTE.—See INDEX to this and to previous volumes, titles “Limiting Liability,” “Limiting Time;” also “Notes” on said subjects.

The only Nebraska case in this series, earlier than the two preceding cases, is *Becker v. W. U. Tel. Co.*, vol. 1, page 337.

THOMAS W. PEARSALL, Respondent, v. THE WESTERN
UNION TELEGRAPH COMPANY, Appellant.

New York Court of Appeals, January, 1891.

(124 N. Y. 256.)

FAILURE TO DELIVER TELEGRAM.—LIMITING LIABILITY.—DAMAGES.

in an action against a telegraph company for damages for erroneous transmission of a message, the plaintiff makes a *prima facie* case by proving the contract for transmission and its breach.

While a telegraph company may limit its liability by contract, it cannot do so by mere notice of its regulations. Accordingly, the message erroneously transmitted having been written on blank paper, held, that evidence of the rule printed in the company's blanks, and evidence of certain regulations of the company, with knowledge of which the plaintiff, being a director of the company, was claimed to be chargeable, were properly excluded.

The message showing upon its face that it was an order to buy stock, held, that the measure of damages was the difference in the market value of the stock between the time when the message reached the plaintiff and when it should have reached him.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Hall*, vol. 2, p. 863; *Kiley v. W. U. Tel. Co.*, vol. 2, p. 650; *Clement v. W. U. Tel. Co.*, vol. 1, p. 671.

APPEAL from judgment of General Term of the Supreme Court, First Department, affirming a judgment for plaintiff upon a verdict.

In July, 1884, the plaintiff was a member of the firm of T. W. Pearsall & Co., bankers and brokers, engaged in business at the Mills Building, No. 17 Broad street, in the city of New York. At about 8 o'clock in the forenoon of July 31, 1884, the plaintiff wrote on a sheet of blank paper and delivered to the telegraph operator, at the

station of the Long Island Railroad at Great Neck, the following telegram :

"GREAT NECK, L. I., July 31st.

"T. W. Pearsall & Co., Mills Building, New York City :

"Buy one thousand Western Union Telegraph.

"T. W. PEARSALL."

The message was not prepaid, but it was delivered at the office of T. W. Pearsall & Co. before 10 o'clock in the forenoon of the same day, where the charge of twenty-five cents for its transmission was paid. The operator who received the message at and transmitted it from Great Neck, addressed it to "T. W. Pearsall, Mills Building, New York city," and it was so received by the receiving operator in New York, so written out on defendant's blank form No. 1, sealed in an envelope and addressed "T. W. Pearsall, Mills Building, New York city." The following is a copy of the message as transmitted from Great Neck and as delivered :

"Form No. 1.

"THE WESTERN UNION TELEGRAPH COMPANY.

"This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message. This is an unrepeated message, and is delivered by request of the sender under the conditions named above.

"THOMAS T. ECKERT, *Manager*.

NORVIN GREEN, *President*.

	" 6	8.47		8.84.
Number	Sent by	Rec'd by	7 Collect.	Check Delivered from 16 Broad Street.
1.	Jm.	Fg.		

"Received at the Western Union Building, 195 Broadway, New York July 31, 1884.

"Dated GREAT NECK DEPOT, L. I., 31.

"To T. W. Pearsall, Mills Building, N. Y.:

"Buy one thousand Western Union Telegraph.

"T. W. PEARSALL."

No person connected with the office of T. W. Pearsall &

Co. had authority to open telegrams addressed to the plaintiff individually, and this one remained unopened until about 10 o'clock A. M. of August first, when the plaintiff reached his office, opened and read the message. The result was that the shares ordered were not purchased July thirty-first, and on the morning of August first they had risen in the market so that they sold for \$1,700 more than they did on the morning of the day before, and the plaintiff then actually purchased that number of shares and paid the market rate.

This action was brought to recover the sum of \$1,700. The defendant by its amended answer admits that the message was delivered at its office at Great Neck, L. I., to a son of its agent, and, by the letter of its general manager, admits that the error in its transmission was that of the operator at Great Neck, but it alleges that at this time, and for a long time previously, the defendant was using a blank upon which messages were usually written which contained the following printed matter :

"Form 2.

"THE WESTERN UNION TELEGRAPH COMPANY.

"All messages taken by this company are subject to the following terms :

"To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed, between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same ; nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured ; nor in any case from delays arising from unavoidable interruption in the working of its lines or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

"Correctness in the transmission of messages to any point on the lines of this company can be insured by contract, in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz., one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any

greater distance. No employee of the company is authorized to foregoing.

"No responsibility regarding messages attaches to this company same are presented and accepted at one of its transmitting office a message is sent to such office by one of the company's mess acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free limits of the terminal office — for delivery at a greater distance, charge will be made to cover the cost of such delivery.

"The company will not be liable for damages in any case where is not presented, in writing, within sixty days after sending the

"THOS. T. ECKERT, *General Manager*. NORVIN GREEN, *Pr*

It is also alleged in the answer that plaintiff had of these terms and conditions.

Upon the trial the plaintiff testified: "I am fi with the general appearance of the blanks, with the heading, which the Western Union Telegraph Co furnishes to persons whose business it desires, and been so for a good many years. I have frequent messages written on such blanks. Bundles of such are lying on the table in my office, ready of access one who desires to send a message by telegraph. Th quite a parcel of them there always in full view. been in the habit of taking blanks from that pile and ing messages on them and sending them myself, had been previous to the time this message was writ the thirty-first of July, 1884. * * * Q. Did you in point of fact, before sending this message, read this printed matter that is at the head of the blan your office? A. No, sir. Q. Had you, in any knowledge of the terms of those conditions? A. No, On the trial, the defendant offered in evidence blank No. 2, and insisted that the plaintiff was bound l terms, but the court rejected the offer and ruled tha terms were not binding on the plaintiff. But two tions were submitted to the jury: (1) Whether defendant was negligent in transmitting the message. The amount of damages. The jury returned a verdi \$1,757.86, upon which a judgment was rendered which

affirmed by the General Term, from which the defendant appeals to this court.

Burton N. Harrison, for appellant.

Thomas G. Shearman, for respondent.

FOLLET, Ch. J.: This action was tried and a recovery had at Circuit, which was sustained at the General Term on the theory that the contract between the parties was the one implied by law when a telegraph company receives, without conditions, a message for transmission. Among other obligations, implied in such a case, is the duty to accurately transmit and deliver to the addressee the message received, which in this case defendant failed to do, as it admits, by reason of the mistake of the operator who received and undertook to send forward the communication. Under such a contract a telegraph company does not insure the accurate transmission and delivery of a dispatch, but undertakes to exercise due diligence to do so.

The question has several times arisen whether, in actions for damages against such corporations for failing to accurately or promptly deliver communications, a plaintiff makes out a *prima facie* case by proving the contract and its breach, or whether the plaintiff must go further and give evidence of some negligent act of omission or commission on the part of the corporation or of its agents.

Rittenhouse v. Independent Line of Tel., 1 Daly, 474 (44 N. Y. 263), was brought to recover damages for failing to correctly transmit a message, and it was held that a *prima facie* case was made out by showing that the communication delivered was not a copy of the one sent.

In *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, a dispatch was received for "Erie Darling," but as transmitted it was addressed to "E. R. Cooley," and was not delivered to Darling for several days; and it was held that by proof of these facts a *prima facie* case was established.

In *Breese v. U. S. Tel. Co.*, 48 N. Y. 132, it was proved

that a message directing the purchase of \$700 in gold was changed to one ordering \$7,000 in gold, and it was said though not necessary for the decision of the case, that was not *prima facie* proof of negligence.

The rule laid down in the first two cases has been followed by the courts of other States, and is approved by the text writers. Whart. on Neg. sec. 756; Gray Tel. sec. 26, 53, 54, 77; Abb. Tr. Ev. chap. 32; 2 Green. Ev. sec. 22 *note*; 2 Shear. & Red. Neg. sec. 542; 2 Thomp. Neg. 83 Suth. Dam. 295.

The court correctly instructed the jury that the evidence made out a *prima facie* case of negligence against the defendant.

In the cases holding that telegraph companies are not liable when grossly negligent, there were contracts exempting them from liability, except to refund the tolls received for negligently sending or delivering the communication. Without considering whether there is any legal distinction to be drawn between gross and ordinary negligence in such cases, it is sufficient to say that these cases are not germane to the question in the case at bar.

At the time this message was received the plaintiff was one of the defendant's shareholders, and it was offered and proved, in defense of the action, that the board of directors had adopted a resolution that it would not be liable for mistakes or delays in the transmission or delivery of unrepeatable messages, and would not be liable for damages arising from delays in the transmission or delivery of a repeatable message beyond an amount specified; and it was insisted that he, being a shareholder, was chargeable with notice of this resolution. The regulations were excluded, and the defendant excepted. In this there was no error, for a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and the plaintiff's rights arising out of defendant's contract to transmit the message were in no wise limited.

by its regulations or by-laws not brought to the plaintiff's knowledge: *Hill v. Manchester & Salford Water Works Co.*, 5 B. & Adol. 866; *Rice v. Peninsular Club*, 52 Mich. 87; Mor. Corp. secs. 500, 500a.

The court instructed the jury that the plaintiff was entitled to recover the difference between the market value of the stock on the morning of July 31st and the sum which he paid for it on the morning of the following day. It distinctly appeared on the face of the dispatch that it was an order to buy shares; and in such cases the liability of the corporation not being limited by a special contract, the measure of damages is the difference between the market value of the shares at the time when the dispatch should have been delivered and the sum paid for them in the market on the receipt of the message. *Rittenhouse v. Tel. Co.*, 44 N. Y. 263; *Leonard v. Tel. Co.*, 41 id. 644; *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; 3 Suth. Dam. 307.

It is insisted on behalf of the defendant that the court erred in excluding from the consideration of the jury the conditions printed on Form No. 2. It is settled that a telegraph company, incorporated under the general statutes of this State, may, by contract, limit its liability for mistakes or delays in the transmission or delivery, or for the non-delivery, of messages caused by the negligence of its servants, if the negligence be not gross, to the amount received for sending the dispatch. *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *Kiley v. W. U. Tel. Co.*, 109 id. 236. But it has never been decided by the court of last resort that such a company can, by notice, limit its liability for such mistakes or delays.

Breese v. U. S. Tel. Co., 45 Barb. 274 (48 N. Y. 132) arose out of the erroneous transmission of a message written on a blank containing printed conditions, and it was held that a party by writing his dispatch on the blank assented to the printed terms and conditions. In discussing the question it was said: "They (telegraph com-

panies) can thus limit their liability for mistake not occasioned by gross negligence or wilful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him." We think this remark can not be regarded as an adjudication that the common law liability of a telegraph company may be limited by a mere notice, unless it is brought to the personal knowledge of the sender of the message, and he is shown to have assented to it. In this State a common carrier may, by an express contract with the shipper, exempt itself from liability for loss or damage occasioned by the negligence of its servants. *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 442; *Poucher v. N. Y. C. R. R. Co.*, 49 id. 263; *Cragin v. N. Y. C. R. R. Co.*, 51 id. 61; *Spinetti v. Atlas S. S. Co.*, 80 id. 71; *Mynard v. S. Y. R. B. & N. Y. R. R. Co.*, 71 id. 180; *Wheeler on Carriers*, 76, 86. But a common carrier cannot, by notice, limit its common law liability to safely carry and deliver goods without evidence of the shipper's assent to the limitations proposed. *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, id. 251; *Clark v. Faxton*, 21 id. 153; *Camden, etc. Trans. Co. v. Belknap*, id. 354; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Blossom v. Dodd*, 43 id. 264.

Telegraph companies organized like the defendant under chapter 265 of the laws of 1848, and the acts amendatory thereof and supplementary thereto, like companies incorporated for the carriage of goods and passengers, owe duties to the public. Such corporations, like railroads, may exercise the right of eminent domain, and they are required to exercise due diligence to transmit with celerity and skill all messages delivered to them, subject to such reasonable rules as may be adopted to protect their rights and facilitate the performance of their duties. They, like common carriers, have become necessary instrumentalities for conducting the business of the country, and they owe the same duty to the public, and, we think, should be held to the same rule in respect to their right to limit their liability by

notice. In this State the doctrine that the common law liability could not be limited without an express contract has been applied to individuals and firms acting as common carriers, as well as to corporations.

In *MacAndrew v. Electric Tel. Co.* (17 Com. B. 3), it was said that the common law liability of a telegraph company may be limited by notice, but the report of the case does not show whether the message was written on a blank with or without conditions. But in England it was held that carriers could, by notice, limit their liability for the loss of goods, even in cases of gross negligence, which resulted in statutes providing that their liability could not be limited except by an express contract. (Sec. 6, chap. 68, 11 Geo. IV. and 1 Wm. IV; sec. 7, chap. 31, 17 & 18 Vic.)

In *Clement v. Western Union Tel. Co.*, 137 Mass. 463, a message not written upon one of the defendant's blanks was sent to its office for transmission. It was forwarded in due time, but was not delivered by the office at which it was received. In an action brought for the recovery of damages occasioned by the failure to deliver, it appeared that the plaintiff's agent who sent the message knew the terms and conditions on which the defendant, by its rules, provided that messages should be sent over its line as set forth in the blank then in use by it, and it was held that this knowledge of the plaintiff's agent was binding upon him, and that no recovery could be had.

In the case last cited a different rule was applied to telegraph companies from the one applied by the same court to express companies. In *Gott v. Dinsmore*, 111 Mass. 45, the plaintiff shipped goods by express, not taking at the time the usual receipt containing printed conditions limiting the liability of the company, with which the plaintiff was familiar, he having been in its employment and issued many such receipts. It was held that mere notice brought home to the owner of the goods, by which the carrier seeks to limit its common law liability, and the terms of which are not expressly assented to, were insufficient to defeat a claim for loss. The court said: "Nor

does the knowledge of the regulation which the plaintiff had previously acquired while in defendant's employment subject him to limitations imposed by the receipt." In *Ellis v. American Tel. Co.*, 13 Allen, 226, the reasons are clearly and satisfactorily stated for the existence of the rule that telegraph companies are not, unless they so expressly contract, held to warrant or insure the accurate transmission or prompt delivery of messages, and are only liable for negligence. But we find no satisfactory reason in this or in any case for a rule that such companies may, by notice, limit their liability for negligence, nor do we see any in the nature of the business in which they are engaged. Carriers and telegraph companies are alike engaged in *quasi* public employments, and persons are, from necessity, compelled to employ the latter without more opportunity for choice and deliberation than when they select the former. As before shown, the liability on contract of carriers of goods which is implied by law can not be limited by notice, and it is difficult to see why telegraph companies should be permitted to limit a much less onerous obligation by a mere notice.

The judgment should be affirmed, with costs.

Dissenting opinion by BRADLEY and BROWN, JJ.

NOTE.—See INDEX to this and to previous volumes, titles "Limiting Liability," "Damages;" also "Notes" on said subjects.

The telegraph law seems to be quite well settled in New York State, this being the only referred to case during the period covered by this volume.

Earlier cases are those reported in note, vol. 2. p. 684, and those reported at pages 647, 650, 660, 669, 674 and 679 of said volume.

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J. T. YOUNG v. WESTERN UNION TELEGRAPH COMPANY.

North Carolina Supreme Court, Oct. 13, 1890.

(107, N. C. 870.),

DELAY OF TELEGRAM.—DAMAGES.—RIGHTS OF ADDRESSEE.

(Head-note by the court):

Where a telegraph company received for transmission the following message: "Come in haste; your wife is at the point of death," and failed to deliver the same for eight days, though the receiver's place of business was well known, and within a short distance of the office of the company in the town in which the receiver resided, whereby he was prevented from being present at his wife's death, or attending her funeral, held, (1) there was gross negligence, and the receiver was entitled to maintain an action for the tort; (2) the plaintiff is entitled, in addition to the nominal damages, to recover compensation for the mental anguish inflicted on him by the negligence of the defendant.

Cases of this series cited in opinion: *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 736; *Chapman v. W. U. Tel. Co.*, vol. 3, p. 670; *Reese v. W. U. Tel. Co.*, vol. 3, p. 640; *W. U. Tel. Co. v. Adams*, post; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *Stuart v. W. U. Tel. Co.*, vol. 2, p. 771; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 848; *Gulf, &c. Co. v. I. Levy*, vol. 1, p. 536; *Gulf, &c. Co. v. J. T. Levy*, vol. 1, p. 548; *Gulf, &c. Ry. Co. v. Miller*, vol. 2, p. 781; *W. U. Tel. Co. v. Simpson*, vol. 2, p. 819; *Loper v. W. U. Tel. Co.*, vol. 2, p. 791; *Marr v. W. U. Tel. Co.*, vol. 2, p. 720; *W. U. Tel. Co. v. Fatman*, vol. 1, p. 666; *W. U. Tel. Co. v. Reynolds*, vol. 1, p. 487; *Logan v. W. U. Tel. Co.*, vol. 1, p. 285; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *Russell v. W. U. Tel. Co.*, vol. 1, p. 653.

C. Manly and *F. M. Simmons* (*O. H. Guion* filed a brief), for plaintiff.

W. W. Clark, for defendant.

CLARK J.: This was a civil action tried before BOYKIN, J., at the fall term, 1889, of Craven Superior Court, upon demurrer to the complaint.

The complaint alleges, in substance, that, on 26th February, 1889, the step-father of plaintiff's wife, at Greenville, S. C., at whose house the wife was on a visit, delivered to the defendant telegraph company the following telegram, paying the sum charged for its transmission :

GREENVILLE, S. C., Feb. 26, 1889.

"To J. T. Young, New Berne, N. C.: Come in haste. Your wife is at the point of death.

"[Signed] J. W. RICE."

That the telegram was received by the agent of defendant at New Berne, on the 27th of February, and with ordinary care and attention could have been delivered to plaintiff within a few minutes after its receipt, as the plaintiff's residence and place of business were well known, the latter being on a principal street, within 400 yards of the telegraph office, and plaintiff had been a resident many years, continuously, in New Berne, engaged in business there; that, by the gross negligence of defendant, the plaintiff had no notice of such telegram until the receipt of a letter from the sender on March 5th, whereupon he went to defendant's office on March 6th, and demanded the telegram, which was then delivered to him; that the plaintiff was continuously in New Berne, at his usual place of business, from February 26 till March 6, 1889; that had the telegram been delivered with reasonable promptness he could have had the consolation of being with his wife in her last moments, and of attending her funeral, but by reason of aforesaid gross negligence on the part of the defendant, the death and burial of his wife took place without any knowledge thereof on the part of the plaintiff; that the plaintiff has suffered great pain, mental anguish, and distress by reason of the gross negligence and delay in transmitting and delivering the telegram, and demands damages. The defendant demurred to the complaint on the ground that "It does not state facts sufficient to constitute a cause of action, in that the only damage which it is alleged that plaintiff has sustained is mental anguish and grief by reason of the plaintiff's not being able, on account of

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defendant's failure to deliver the message, to be present with his wife during her illness and attend her funeral."

The demurrer was overruled, and defendant appealed. In addition to the ground of demurrer set out in the record the defendant demurred *ore tenus* in this court that the complaint did not state a sufficient cause of action, in that the plaintiff was not a party to the contract, and therefore could not maintain an action for its breach.

Upon the question whether the receiver can maintain the action, Shearman & Redfield on Negligence, section 580, say: "We think, therefore, upon the principle of these decisions, a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often receive great damages without any means of redress." There is ample authority to the same effect: *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 695; *Elwood v. Telegraph Co.*, 45 N. Y. 549; *Ellis v. Telegraph Co.*, 13 Allen, 227; *N. Y. P. Co. v. Dryburg*, 35 Pa. St. 298; *Markel v. Telegraph Co.*, 19 Mo. App. 80, and many others. This, while not the English rule, is stated by Gray on Telegraphs, section 65; 2 Thomp. Neg. 847; 5 Lawson's Rights & Rem., sec. 1972; and Whart. on Neg., sec. 758, to be the invariable rule in this country. The following may be summed up as the reasons assigned therefor: (1) That a telegraph company is a public agency, and responsible, as such, to anyone injured by its negligence, or at least it is the common agent of sender and receiver, and responsible to each for any injury sustained by them, respectively, by its negligence. (2) That in a case like this the receiver is the beneficiary of the contract, and the injury, if any, caused by the company's negligence, must be to him; (3) The message is the property of the party addressed in analogy to a consignee of goods. (4) That, upon the face of the message such as this, the sender is the agent of the receiver, and the latter, as the principal, can maintain an action for breach of the contract, or for a *tort*, if injury is done him by negligence in

performance of the duty contracted for. "The company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver." 3 Sutherland Dam. 314. This author goes on to state that where there is gross or wilful negligence the action can be brought either for *tort* or on contract, and, in case of misfeasance, the company is liable also to the parties as wrongdoers.

Upon authority and reason we think it clear that the plaintiff could maintain the action, and, whether it is an action *ex contractu* for breach of the contract of speedy and safe transmission, or *ex delicto* for negligence and violation of the duty which the defendant owed as a public corporation, or as a common agent of sender and receiver, at least nominal damages could be recovered.

"The principle that for the violation of every legal right, nominal damages, at least, will be allowed, applies to all actions, whether for *tort* or breach of contract, and whether the right is personal, or relates to property." 1 Sutherland Dam. 11. Where "there is a neglect of duty by a telegraph company and an infraction of the plaintiff's right to have care and diligence used in the sending and delivery of his message, he is entitled to nominal damages at least." *Ibid.*

The other question, and the one most earnestly pressed upon our consideration, is whether the plaintiff can recover for mental pain and anguish when there has been no physical injury.

In Shear. & Red. on Neg., sec. 605, it is said: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should

be at liberty to award fair damages. Yet, in such cases, the damages ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message."

This paragraph was cited and approved by the Court of Appeals of Kentucky in an opinion filed in June of this year (*Chapman v. Western Union Telegraph Co.*, 13 S. W. Rep. 880), in which the court says: "This seems to us to be the true rule — one which is in accord with reason, and necessary to a proper protection of individual right, and the interests of the public."

In this case the court held that the plaintiff could recover damages for delay in the delivery of a message announcing the illness and death of the plaintiff's father, and says:

"Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract; and, whenever a party does so, he is liable at least to some extent. Every infraction of a legal right causes injury, in contemplation of law. The party being entitled in such a case to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a *quasi* public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If in matters

of mere trade it negligently fails to do its duty, it is responsible for all the natural and proximate damage. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for \$100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such rule, at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act.

“The injury to the feelings should be regarded as a part of the actual damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so may it be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element to the actual damages in slander, libel and breach of promise cases, it seems to us it should equally be so considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity; legal insult, added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings, or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same and the violator should answer for all the proximate damages.”

In Indiana and Texas, opinions to the same effect have also been filed during the present year. In the Indiana case, *Reese v. W. U. Tel. Co.*, in the Supreme Court of that State (March, 1890), 123 Ind. 294, BERKSHIRE, J., says: "Although the telegram had no relation to any business transaction which would have involved dollars and cents merely, this did not justify the appellee in neglecting its duty. It had undertaken for a valuable consideration to deliver the message promptly, and its failure so to do, or to make reasonable effort in that direction, was negligence, and a violation of its undertaking. The diligence which a telegraph company is required to use in the delivery of a message will be determined to some extent from the character and importance of the message. Upon humane grounds, messages like the one here involved, should be promptly delivered, and should be regarded as of more importance to the parties concerned than mere business messages, and, in promptness of delivery, should have preference over messages of the latter class. * * * From the information it had before it when it entered into the undertaking, the appellee was bound to know that mental anguish might, and most probably would, come to some person in case it failed to act promptly in transmitting and delivering the dispatch, and therefore such a result was contemplated when the message was delivered by the appellant to the appellee's agent at Jamestown, and is within the undertaking. * * * The appellant having suffered great mental anguish, because, as he alleges, of the failure to promptly deliver the message, it would be a harsh rule which would deny to him all redress except the mere pittance which he paid to have the telegram transmitted and delivered. Some of the authorities seek to draw a distinction as to the right to recover damages for mental suffering, between cases where there may be a recovery for pecuniary loss, and cases where there is or can be no pecuniary loss, to which class the present action belongs. With this distinction we have no sympathy, and confess we can see no good reason for it to rest upon. If a telegraph company undertakes to trans-

mit and deliver promptly a message wherein dollars and cents are alone involved, and its negligence occasions loss, it is conceded by all the authorities that it may be compelled to respond in damages. Why? Because it has negligently broken its agreement, or, as is sometimes said, failed to perform a duty which it owed to the sender of the message, or to the person to whom it is addressed, as the case may be. For the same pecuniary consideration it undertakes to transmit and deliver a message informing a husband of the dangerous illness of his wife, the wife of her husband, the parent of the child, the child of the parent, and it negligently fails to deliver the telegram, and, as a result, the sick relation dies without having the comforting presence of a husband, wife, father, mother, son or daughter, with all the benefit, physical and mental, which would follow. Is it to be said that, under such circumstance, the most that the telegraph company is liable for is nominal damages, because of greater mental anguish suffered by the sender of the telegram, who may be the father, mother, husband, wife or child? In our judgment no such rule can or should prevail. In failing to promptly deliver the telegram the telegraph company negligently fails to perform a duty which it owes to the sender of a telegram, and should be held liable for whatever injury follows as the proximate result of its negligent conduct. It is not a mere breach of contract, but a failure to perform a duty which rests upon it as a servant of the public. In our opinion the appellant is entitled to recover damages for the mental suffering which he has endured, and his measure of damages is the amount paid for the transmission of the message, and, in addition, what would seem to be just as a compensation for his mental anguish."

In the other case — *W. U. Tel. Co. v. Moore* (Feb., 1890), 76 Tex. 66 — the court held that "A message delivered for transmission to a telegraph company, containing the words, 'Billy is very low. Come at once,' is sufficient to apprise the company that the message refers to a near relative of the person to whom it is addressed, and of the fact that

mental suffering is likely to result from a failure to transmit the message with diligence and dispatch," and says: "In the case of *Telegraph Co. v. Adams*, 75 Tex. 531, it was held, in effect, that a recovery could be had for mental suffering resulting from a failure to deliver with diligence a telegraphic message announcing the sickness or death of a relative, provided the language employed in the message was reasonably sufficient to put the company upon inquiry as to the relationship between such person and the party addressed, and to apprise them that its object was to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in case of death. The same principle was affirmed in the case of *Telegraph Co. v. Feegles*, 75 Tex. 536, decided at the same term, and *Telegraph Co. v. Broesche*, 72 Tex. 654 (1889).

In *Telegraph Co. v. Cooper*, 71 Tex. 507 (1888), COL-LARD, J., says: "Appellant claims that its demurrers to plaintiff's petition should have been sustained, because injury to feelings disconnected from an actual personal injury are exemplary damages, and the facts alleged are not sufficient to recover exemplary damages. The very question raised here was before the Supreme Court in the case of *Stuart v. Telegraph Co.*, 66 Tex. 580, and the court after discussing the *So Belle Case*, 55 Tex. 310, and the two *Levy Cases*, 59 Tex. 543, 563, the case of *Hays v. Railroad*, 46 Tex. 272, and other authorities, uses the following language: 'But it is claimed that the mental is an incident to the bodily pain, and that, without the latter, the former cannot be considered as actual damages. In cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this case—not more obviously the consequences of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in doing the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness as well as by a wound to the person.' The conclusion

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derived from the opinion in the case, from which the following extract is taken, is that injury to the feelings caused by the failure to deliver a message relating to domestic affairs, where the failure is the result of negligence on the part of the company or its servants, is an element of actual damages. The same principle was decided by the Commission of Appeals in the case of *Railroad Co. v. Miller*, erroneously styled in the reports *Railway Co. v. Wilson*, 69 Tex. 739, and it was held that the right to recover would not depend upon the degree of negligence causing the injury. If the inexcusable negligence of the defendant's servants is found to be the proximate cause of the injury, damages may be recovered commensurate with the injury."

In *Telegraph Co. v. Simpson*, 73 Tex. 422, the court reaffirmed the same doctrine as does *Loper v. Telegraph Co.*, 70 Tex. 689, which is exactly like our case, except that the relationship was that of a mother who was prevented from being at her son's death bed and burial by negligent delay in the delivery of the telegram.

In a recent case (1888) decided in the Supreme Court of Tennessee (*Wadsworth v. W. U. Tel. Co.*, 86 Tenn. 81) that court affirms the same doctrine, and CALDWELL, after quoting the authorities to the effect that damages for mental anguish cannot usually be given in an action for breach of contract, says: "These are but illustrations and applications of the general rule which we have already stated for the estimation of damages in actions for breach of contract. They serve the purpose of showing that in the ordinary contract, only pecuniary benefits are contemplated by the contracting parties; and that therefore damages resulting from the breach of such a contract may be measured by pecuniary standards; and that, where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of damages flowing from the breach. The case before us (so far as it is an action for the breach of contract) is subject to the same general rule; and the defendant is answerable

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damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its non-performance. The messages were sent for a particular purpose, which was disclosed upon their face, and of which the defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything; no proposition or promise with respect to any business transaction. The messages were of far greater importance to the receiver than any of these. Her brother was lying at the point of death, in easy reach of her. It was information of this fact that the defendant first undertook to convey to her for a stipulated sum, and which, if conveyed promptly, would have enabled her to be with him in his last moments, and would have saved her the injury of which she complains. Then her brother died away from her; his body needed her attention, and would have received it, as owned, if the defendant had done its duty. It was intelligence of the death which the defendant agreed, in the second place, to communicate to her. The messages were proper in language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits were mainly or altogether to the feelings or affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain or anguish such information, promptly conveyed, would prevent. By all the authorities, including our Code, it was the duty of the defendant to transmit and deliver these messages 'correctly and without unreasonable delay;' and, in failing to do so, it became responsible for all loss or injury occasioned thereby. Code, Mill & V., sections 1541, 1542; *Marr v. Telegraph Co.*, 1 Pickle, 329; Gray, Tel., sections 81-82, *et seq.*; Cooley, Torts, 646-647; Whart. Neg., sec. 767; 3 Suth. Dam., 298-300; Shear & Red. Neg., sec. 605. This rule of damages is enforced by the Supreme Courts of Georgia, Virginia and other States, even where the message is in cipher. *Telegraph Co. v. Fatman*. 73

Ga. 285 (54 Amer. Rep. 877); *Telegraph Co. v. Reynolds*, 77 Va. 173 (46 Amer. Rep. 715), and reporter's note at end of case. It is true that most of the adjudged cases in which telegraph companies have been required to respond in damages for their negligence have involved questions of pecuniary loss; but we cannot agree that for that reason the liability should attach and be enforced in such cases only. Telegraphy is of comparatively recent origin, and the law concerning the duty and liabilities of telegraph companies has hardly passed its infancy, and cannot be expected, at so early a day in its history, to be settled, even in its important parts, by a long line of concurring decisions.

"In addition to this, it is but reasonable to presume that such a flagrant breach of plain obligation, with respect to matters so near the heart, and so accustomed to the respect of all mankind, as is here averred, has but seldom occurred, and therefore has but seldom been brought to the attention of the courts of this country. To hold that the defendant is not liable, in this case, for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default would be to disregard the purpose of the telegrams altogether, and to violate the rule of law which authorizes a recovery of damages appropriate to the objects of the contracts broken; and, furthermore, such a holding would justify the conclusion that the defendant might, with impunity, have refused to receive and transmit such messages at all, and that it has the right in the future to do as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so. To such a result, we think no court should submit. The telegraph company is the servant, rather than the master, of its patrons.

* * * * *

"That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether, for the same objection may be urged with the

same force in all cases where mental and bodily suffering are treated as proper elements of damage. It is very appropriately said, however, in the conclusion of the opinion in *So Relle's Case*, that 'great caution should be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative, with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which the recovery may be had ; and the attention of juries might well be called to that fact.' Nor do we think that the suggestion that the decision we are making may encourage the bringing of other suits of a similar nature is of very great moment as a matter for the consideration of the court in its endeavor to reach a just and sound conclusion. It is rather to be hoped that instances of such dereliction of plain, easy, and important duty have not been very numerous in the past, and that they will seldom transpire in the future."

In the U. S. Circuit Court, in the matter of *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181 (decided 1889), the court held that, if by cause of the unreasonable delay of a telegram, the husband was prevented from reaching his wife's bed before her death, he could recover a proper compensation for his disappointment and mental anguish. The judge (MAXEY) very properly adds that caution should be observed by the jury to distinguish between the pain caused the plaintiff by the wife's death, for which the defendant was not responsible, and that caused by being deprived by defendant's negligence of the consolation of seeing his wife before her death.

This subject is one of the first impression in this State.

It is a matter of importance to the public that it should be settled what legal obligation, if any, rests upon the telegraph companies to deliver promptly messages of a social nature, not concerning pecuniary transactions. To many, and in many instances, they are far more important. If no pecuniary damages can be recovered for a breach of the duty to deliver such messages, beyond the recovery of the

petty sum paid for transmission, the usefulness and value to the public of such corporations will be materially diminished. We have therefore cited quite fully from the most recent cases on the subject. There are older cases sustaining the same doctrine.

In *So Belle v. Telegraph Co.*, 55 Tex. 308, it was held that a telegraph company is liable for injury to the feelings of a son by delay in delivering to him a message announcing the death of his mother, whereby he was prevented from attending her funeral.

In *Stuart v. Telegraph Co.*, 66 Tex. 580, it was held that where, by gross negligence in delivering a telegram, plaintiff was prevented from seeing his brother in his last illness, and attending his funeral, compensation for injury to feelings may be recovered. The same principle is intimated in *Logan v. Telegraph Co.*, 84 Ill. 468. And there are other authorities. There are some authorities to be found of a contrary tenor (*West v. Telegraph Co.*, 39 Kan. 93; *Russell v. Telegraph Co.*, 3 Dak. 315, and some others), but they fail to satisfy us that they are consonant to justice and the "reason of the thing."

Damages for injury to the feelings, such as mental anguish or humiliation, are given, though there may be no physical injury, in many cases. They are allowed where a party is wrongfully put off a train (3 Suth. Dam. 259); in actions for breach of promise of marriage; in actions for slander and libel (*Terwilliger v. Wands*, 17 N. Y. 54); in actions for malicious arrest and prosecution (*Fisher v. Hamilton*, 49 Ind. 341); in actions for false imprisonment (*Steward v. Maddox*, 63 Ind. 51); for illegally suing out an attachment (*Byrne v. Gardner*, 33 La. Ann. 6); for *crim. con.*, and for seduction, and in other cases. Damages for injured feelings were also allowed where a conductor kissed a female passenger against her will. *Craker v. Railroad*, 36 Wis. 657. In actions by a father for seduction of a daughter, by a fiction of law, the damage is laid *per quod servitum amisit*, but the recovery is generally out of all proportion to any possible valuation of the services, and it

is well understood that in fact compensation is not given for them, but for the wounded and outraged feelings of the parent. We, see, therefore, no reason why the doctrine of compensation for injury to feelings should not embrace a case like the one before us.

When a passenger, while traveling on the cars, is injured by a collision or other negligence, though there is a breach of the contract of safe carriage, yet the plaintiff can elect to hold the carrier liable in tort for the negligence which caused the injury. *Wood v. Railway Co.*, 32 Wis. 398; *Craker v. Railroad*, 36 Wis. 657-675; and cases cited.

By analogy, when there is an injury caused by negligence and delay in the delivery of a telegram, the party injured is entitled to sue *in tort* for the wrong done him. In *Stuart v. Telegraph Co.*, 66 Tex. 580, it is said: "We have no forms of action or technical rules which can prevent a plaintiff upon a statement of the facts of his case from recovering all the damages shown to be sustained. If the facts stated show a breach of contract, and also that the breach is of such a character as to authorize an action of tort, all the damages for the thing done or omitted, either *ex contractu* or *ex delicto*, may be recovered in the one action." To same effect, *Gulf R. R. Co. v. Levy*, 59 Tex. 547, and *Wadsworth v. Telegraph Co.*, 86 Tenn. 695.

It seems to us that this action is in reality in the nature of a tort for the negligence, and that, as is usually the case in such actions, the plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damages done him, and that mental anguish is actual damage. "It is very truthfully and appropriately remarked by a learned author that the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the suffering of each frequently, if not usually, act reciprocally on the other. 3 Suth. Dam. 260." And Cicero (who certainly may be quoted as an authority among lawyers) says in his eleventh Phillippic against Anthony: "*Nam quo major vis est animi quam corporis, hoc sunt*

graviora ea quae concipiuntur animo quam illa quae corpore." "For, as the power of the mind is greater than that of the body, in the same way the sufferings of the mind are more severe than the pains of the body."

The difficulty of measuring damages to the feelings is very great, but the admeasurement is submitted to the jury in many other instances, as above stated, and it is better it should be left to them under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than on account of such difficulty, to require parties injured in their feelings by the negligence, the malice, or wantonness of others, to go without remedy.

Scott & Jarnagin on Telegraphs, § 418, says that damages for gross negligence in the delay of a telegram, whereby the feelings of the parties are outraged, are vindictive or exemplary, and largely in the discretion of the jury; that they are given rather to punish the offender than to recompense the party injured; and some of the authorities above referred to support that view. Our own opinion, however (certainly when no malice is alleged), is that they are awarded as compensation to the plaintiff for the wrong he has sustained in the mental anguish needlessly inflicted on him by the negligence of the defendant. Sedg. Dam. 85.

The demurrer was properly overruled.

Per Curiam: No error.

NOTE.—See INDEX to this and to prior volumes, titles "Receiver or Addressee," "Damages;" also "Notes" on those subjects.

See note to *Sherrill v. W. U. Tel. Co.*, *post*.

This is cited in the two following cases.

THOMAS J. THOMPSON AND WIFE V. WESTERN UNION
TELEGRAPH COMPANY.*North Carolina Supreme Court, Dec. 23, 1890.*

(107 N. C. 449.)

DELAY OF TELEGRAM.—LIMITING LIABILITY.—DAMAGES.

(Head-note by the court):

Mental suffering, caused by negligence and delay in delivery of a telegram not of a pecuniary nature, may be ground of damages, though no physical pain or pecuniary loss is suffered.

Where a telegram is sent by a wife, about to be confined, to summon her husband, and by reason of negligent delay in the delivery of twenty-four hours he did not arrive, whereby, the complaint alleges, she suffered more physical pain, mental anxiety and alarm, on account of her condition, and sustained permanent and incurable physical injury for want of his presence and services, *held*, such damages are not too remote.

Where a telegraph office had the sign of the defendant company over the door, and the operator at that point testified that he paid over all receipts to the treasurer of said company, the office was *prima facie* an office of the defendant.

The stipulation on a telegraph blank against liability for an unrepeatd message does not protect the company, where such message is negligently delayed in transmission. If such stipulation has any validity at all, it is only in cases of a mistake in transmitting, and then only when the negligence is slight.

Cases of this series cited in opinion: *Young v. W. U. Tel. Co.*, ante, p. 784; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *Pegram v. W. U. Tel. Co.*, vol. 2, p. 684; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *Smith v. W. U. Tel. Co.*, vol. 2, p. 839; *Gillis v. W. U. Tel. Co.*, vol. 2, p. 841.

APPEAL by plaintiff below from judgment rendered at Caswell Superior Court.

The plaintiff's wife being about to be confined, and at that time in Danville, Va., her son, by her directions, delivered a telegram to the agent of defendant company in Danville, Va., addressed to her husband at Milton, N. C. :

"Father, come at once, mother is sick;" and paid for the same. The telegram was not delivered until next day, in the afternoon, a delay, according to the conflict of evidence, of 24 to 28 hours. By reason of the delay, the plaintiff complained that on his arrival the child had been born (dead), and his wife had suffered greater pain, physically and mentally, than if he had reached home in time, as he would have done if the telegram had been delivered with reasonable promptitude, and for lack of his services and presence, and by reason thereof, she suffered a premature delivery, and incurred a permanent and incurable physical injury therefrom. The defendant's exceptions were: (1) Upon his redirect examination, plaintiff's counsel proposed to ask witness if he had been with his wife in her previous confinements. (Defendant's counsel objected. Objection overruled, and exception.) Witness answered: "I was present with my wife on nearly every occasion, when she had been delivered. Had a doctor every time but once, when it was over before the doctor got there. I delivered her myself. Had hired a carriage in Milton to start immediately on receiving dispatch. Did not write because I heard that it was over. Saw no use in going when train would carry me two hours later." (2) Mary E. Thompson, introduced as a witness in her own behalf, testified: "I am the wife of T. J. Thompson. At time I sent telegram I was complaining, expecting confinement. Ordered telegram sent about ten o'clock, so my husband would come home quickly. Had a difficult labor from 8 o'clock till 12 at night. Had twelve children before this." Counsel proposed to ask this question of witness: "State what effect the failure of your husband to arrive had upon you." (Defendant's counsel objected. Objection overruled, and exception.) Witness answered: "I was worried, and it caused me to be a great deal worse than I would have been. If he had been there, I would have been contented, and would not have had such long suffering. I was taken about eight o'clock, and about ten the pains came on me. I sent the dispatch, and felt easier. Thought h would get there

in two hours and a half. He did not come, and I then got uneasy, and worried. It hurt me more than anything else. I then sent for doctors, and could not get any, but Dr. Day came about dark. I was by myself all day, my sister-in-law there occasionally. I had a little child a year and a half old, which needed attention during the day, and I had to attend to it, and did attend to it, and lifted it up and put it down several times. After the train came, and Mr. Thompson did not come, I gave up. Was suffering everything but death. Asked the doctor what made the child so long coming, and he said it got hung somehow. Child was born about twelve at night. From the anxiety and suffering, and Mr. Thompson's absence, I have suffered from that day to this. If he had been there it would not have been so. I did not have proper attention; have suffered in lower part of my bowels and back ever since." The third exception was for refusal to non-suit plaintiffs because they were non-residents. The fourth exception is stated in the opinion. The fifth exception was for the refusal to give the fifth prayer for instruction, which was as follows: "The defendant asked the court to charge the jury that it has a perfect right to limit its liability on unrepeatd messages for mistakes and delays in their transmission and delivery, and if they believe from the evidence that the message in question was not ordered by the sender to be repeated, and it was received by defendant company as an unrepeatd message, then it was subject to such limitation imposed by the company, and the plaintiffs cannot recover, unless defendant was guilty of gross negligence." The court instructed the jury instead "that the law of unrepeatd messages, which has been argued to them by counsel on both sides, did not apply to this case, as the cause alleged for damages here was not for incorrectly transmitting and delivering a message, but for delay in delivering it." The sixth exception was for refusal of the eighth and ninth prayers for instructions, and was abandoned on the argument. The defendant also excepted, generally, to the charge as given. The defendant's prayers for instruc-

tions 1, 2, 3 and 4 were given as asked, and were as follows: "[1] The court instructs the jury that they believe from the evidence that the delay in the delivery of the telegram mentioned was due to the bad weather which prevailed at that time, or to any causes which were not under the control of the defendant, then they must find for the defendant. [2] If they believe from the evidence that the message was delivered at the office of the company in Danville, he, plaintiff, was told that the wires were in trouble, and that the message was received subject to the delay on that account, and he then, with this knowledge, sent the message which was sent off as promptly as the condition of the wires would permit, then they must find for the defendant. [3] If they believe from the evidence that the message was not delivered at said office until after Mr. Thompson was taken with labor, and that no degree of diligence on the part of defendant, after it was so received, could have transmitted it to Milton in time for Mrs. Thompson to receive it, and come to Danville in time to relieve her husband of anxiety on account of his absence, then the defendant cannot be held amenable for such anxiety, and they must find for defendant. [4] If they believe that the defendant Thompson knew of the condition of his wife, and failed to make proper provision for being present at the time of her confinement, or that she allowed the time of her confinement to approach so near, before attempting to notify him of her condition through the defendant company, that it became impossible for the notice to reach the said husband in time for him to come to the relief of his wife in her present condition, and that such failure to provide for his presence or the failure of the wife to notify her husband in time for him to come, so far contributed to the wrongs and injuries complained of, that, without said failures on their part, the wrongs and injuries would not have happened, then they must find for defendant." The fifth prayer and the sixth prayer given in lieu are stated above. The sixth prayer was that the court should instruct the jury that if they be-

from the evidence that the pain and anxiety of the complainants were from any improper conduct on the part of either of them, or from any thoughtless or unguarded act of either of them under the circumstances, or for the failure of either of them to use and exercise proper care and prudence, considering their condition, or that the pain and anxiety, and the wrongs and injuries, complained of were from any other cause whatsoever than from the negligence of defendant, then they must find for defendant. In response to which, the court charged in the fifth paragraph of the charge: "Upon the third issue, if the jury believe from the evidence that the wrongs and injuries complained of are the direct and proximate result of the negligence of defendant, that they followed as a natural consequence of the negligence of defendant, then they must answer the third issue, 'Yes.' But if they believe that the wrongs and injuries were produced by any cause whatsoever other than the negligence of defendant, then they must answer the third issue, 'No.'" The seventh prayer which was given was: "The court instructed the jury that mental suffering and anguish, unless productive of special damage, or resulting from personal injury, are not alone a sufficient ground upon which to maintain an action for damages, and if they believe from the evidence that mental anguish and suffering are the only grounds for damages in this action, they must find for defendant." The eighth and ninth prayers were refused in words, but were given, substantially, in the charge, and exception as to them was abandoned. Verdict and judgment for plaintiff, and appeal by defendant.

G. V. Strong, for appellant.

J. W. Graham, for appellee.

CLARK, J.: This is a petition to rehear the case reported 106 N. C. 549.

Upon a careful review of the former opinion of the

court, we think the petition should be allowed. The fifth paragraph of the charge is a substantial compliance with plaintiff's sixth request to charge. There is no specific exception to the charge. The appellant cannot be heard to complain of an instruction, not excepted to, especially when it follows in substance his prayer of instruction.

The court was misled by the somewhat confusing "make-up" of the lengthy record into supposing that defendant's seventh prayer for instruction was passed over unnoticed in the charge, and while the court did not pass upon the correctness of the prayer, it held that the court below should have granted or have refused it, so that the jury might have had the benefit of the construction of the law involved in the request. A second examination shows that, in fact, the instruction was given as asked by the defendant. It was an erroneous instruction, as has since been held in *Young v. Telegraph Co.*, at this term, but as the error was in favor of the appellant, it cannot be cause of complaint by him.

There was no request to charge that the negligence of the defendant, as shown, was too remote to sustain the action, and an omission to charge upon any particular aspect of a case is not error, unless an instruction is asked and refused. *State v. Bailey*, 100 N. C. 528, and cases there cited. In fact, however, the damages were not too remote, as we think.

A case similar, in some respects, to this is *Telegraph Co. v. Cooper*, 71 Tex. 507. It is there said: "If it is made to appear from the testimony that Mrs. Cooper suffered more physical pain, mental anxiety, and alarm on account of her own condition than she would have done if Dr. Keating had been in attendance upon her, and the failure to secure his services is shown to be due to the want of proper care on the part of the defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffering." In that case, it was a doctor who was telegraphed for, and here the husband, but the *grava-*

men of the complaint is the same, "increased pain and mental suffering," by reason of the absence of the party telegraphed for, who would have been present had not the defendant company negligently delayed the delivery of the telegram.

The instruction as to nominal damages was not excepted to, and besides, as the jury gave substantial damages, we cannot see how the appellant could have been prejudiced. These views require us to consider the other exceptions which were not passed upon in the former opinion.

The first and second exception were to the evidence, and were without merit. The appellant on the argument properly abandoned the third exception, which was for a refusal to non-suit the plaintiff, on the ground that he was a citizen of Virginia, and therefore (as was argued below) incompetent to maintain this action in the courts of this State. *Walters v. Breeder*, 3 Jones, 64; *Miller v. Black*, 2 Jones, 341.

The fourth exception was to the ruling of the court that under the evidence there was *prima facie* an office of the Western Union Telegraph Company in Milton. The evidence of the agent there was that the office in Milton had the sign of that company over the door, and that the money received for sending or receiving messages was paid by him to the treasurer of that company. Also, it was in evidence that the defendant received the message at Danville for transmission to Milton. We find no error in this ruling. It would seem that it was made upon defendant's contention that there was no evidence that it was responsible for the office at Milton.

The defendant's first, second, third, fourth, and seventh prayers were given. The sixth prayer was substantially given as above stated. The eighth and ninth prayers were substantially given in the charge, and the exception as to them was abandoned in this court. The fifth exception was for refusal to give the fifth prayer, which was that, as the message was unrepeatable, the defendant, as per terms

printed on its blanks, was not liable for delay in transmitting, unless guilty of gross negligence.

The stipulation as to repeating messages has been held reasonable in some courts as to mistakes in transmission, but not as to delays. In *Lassiter v. Telegraph Co.*, 89 N. C. 334, it is held that it is a reasonable requirement "to insure accuracy," but that the exemption from liability from non-observance of such requirement is "not extended to acts or omissions involving gross negligence, but is confined to such as are incident to the service, and which may occur where there is but slight culpability in its officers and employees." In *Pegram v. Telegraph Co.*, 97 N. C. 57, which was also a case of mistake in the message, the court reaffirmed *Lassiter v. Telegraph Co.*, but holds that what would be ordinary negligence in sending a message apparently of small consequence might be gross negligence where it was manifest that the message was important. It is held that "the stipulation on the company's blanks, restricting liability for unrepeatd messages, is unreasonable and void where the complaint is not of a mistake in the message, but for delay or failure in delivery." *W. U. Tel. Co. v. Broesche*, 72 Tex. 654 (13 Am. St. Rep. 843.) The more recent cases, founded upon the more thorough investigation and thought given to the subject, are to the effect that any stipulation restricting the liability of the telegraph company for negligence, even as to mistakes in transmission, is void. In *Smith v. Telegraph Co.*, 83 Ky. 104, it said: "Telegraph companies are public agents, engaged in a quasi public business; care and fidelity are essential to their character as public servants, and public policy forbids that they should abdicate their duties as to the public, by a contract with an individual, who is but one of millions, whose business, perhaps, will not admit either of delay or contest in the courts, but who is compelled to submit to any terms that the company may impose, and the law should not uphold a contract by which public agents seek to shelter themselves from the consequences of their own wrong and neglect. In a still more recent case (*Gillis v.*

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Telegraph Co., 61 Vt. 461, 15 Am. St. Rep. 917), this is quoted and approved to its full extent, and cases supporting this principle, many in number, and from courts of the highest authority, are given.

It is sufficient, however, for us to say that the present is a case of a delay, not of a mistake, in the transmission, and that the nature of the message, and the length of the delay, (about 24 hours), both make it a case of gross negligence, unless accounted for to the satisfaction of the jury, which was not done. There was no other exception than those we have passed upon, except the general and vague one "to the charge as given," which is too indefinite to give any information either to the appellee or the court. According to the rulings of nearly all, if not all, appellate courts, and certainly of this court, it does not call for consideration. *McKinnon v. Morrison*, 104 N. C. 354.

On a review of the exceptions of the appellants, we can find no error committed in the trial below. Let this be certified. *Per Curiam*. Petition allowed.

NOTE.—See INDEX to this and to preceding volume, titles "Limiting Liability," "Damages;" also "Notes" on said subjects.

See note to next case for earlier North Carolina cases.

This case is cited in *Chase v. W. U. Tel. Co.*, *post*.

Upon a former appeal this case was reported 106 N. C. 549.

H. Z. SHERRILL v. WESTERN UNION TELEGRAPH

North Carolina Supreme Court, Dec. 23, 1891.

(109 N. C. 527.)

FAILURE TO DELIVER TELEGRAM.—LIMITING TIME TO PRESENT

A stipulation in a telegraph blank, limiting the time in which to claim for damages to a specified number of days "after the message" is in general reasonable, but in case of failure to deliver sufficient compliance if the notice be given within the specified time after the plaintiff acquired knowledge of such failure.

The commencement of an action within the requisite time is a condition.

The person for whose benefit a telegram is sent may maintain an action in case of its non-delivery, whether or not the sender was his agent. Cases of this series cited in opinion: *Massengale v. W. U. Tel. Co.*, p. 724; *Thompson v. W. U. Tel. Co.*, vol. 1, p. 773; *Smith v. W. U. Tel. Co.*, vol. 1, p. 743; *Gillis v. W. U. Tel. Co.*, vol. 2, p. 841; *W. U. Tel. Co. v. Dougherty*, ante, p. 601; *Johnston v. W. U. Tel. Co.*, 862; *Young v. W. U. Tel. Co.*, ante, p. 734; *W. U. Tel. Co. v. Young*, vol. 1, p. 442.

APPEAL by defendant below from judgment of Superior Court, Iredell county, overruling demurrers to the complaint.

The following were the grounds of demurrer:

1. That it appears from the complaint that there was a condition attached to said contract that the defendant should not be liable for damages for any breach unless the claim therefor was presented in writing sixty days after sending said message, and the plaintiff does not allege that the claim upon which this action is founded was presented to the defendant in writing sixty days after the said message was sent, nor does it appear from the complaint that any demand for said damages was made upon the defendant at any time prior to the bringing of this action.

2. That this complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendant, in that it appears from the face of the complaint that the message in question was sent by one M. C. Sherrill to one Franklin Sherrill, and not to the plaintiff, and it is not alleged in the complaint that the said Franklin Sherrill was the agent of the plaintiff to receive and communicate said message to the plaintiff, nor does it appear from the complaint that there exists any privity between this plaintiff and the said Franklin Sherrill in respect to the alleged contract for sending the said message, nor that there was any contract between the plaintiff and defendant in respect to said message, nor any contractual relations existed between the plaintiff and defendant growing out of this alleged contract between the said M. C. Sherrill and the defendant under which the said message was sent.

3. That the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendant, in this, that it fails to show that there existed any relationship between the plaintiff and defendant, and whereby the plaintiff is entitled to recover of the defendant any damages he may have suffered by reason of the alleged negligence of the defendant in failing to deliver the message mentioned therein.

Bingham & Caldwell (by brief) and *M. L. McCorkle*, for plaintiff.

Jones & Tillet (by brief), for defendant.

CLARK, J.: The complainant states, "a copy of the said telegraph message is hereto attached, and asked to be made a part of the complaint." This "copy" is a copy of the telegraph blank, with the message written thereon, and contains the proviso on the margin:

The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

The contention of the plaintiff that nothing is thereby made a part of the complaint except the words of the message itself, is unfounded. The words of the bare message itself were already set out in the complaint, and there could have been no object in attaching another copy. The words must be taken to refer to the "copy" as actually attached, which is a copy of the contract between the parties evidenced by the blank, with the message written thereon, and the printed stipulations on the margin.

The stipulation that the company will not be liable unless the claim is presented "in writing and within sixty days," is not a stipulation restricting the liability of the telegraph company for negligence. *Massengale v. Tel. Co.*, 17 Mo. App. 257. If it were, it would be void, as was held in *Thompson v. Telegraph Co.*, 107 N. C. 449; *Smith v. Telegraph Co.*, 83 Ky. 104; *Gillis v. Telegraph Co.*, 61 Vt. 461 (15 Vt. St. Rep. 917), in which last case numerous authorities are cited. But this stipulation is rather against the neglect of the plaintiff in not making known his cause of complaint within a reasonable time. It is a reasonable requirement, enabling the company to inquire into the nature and circumstances of a mistake in or of the delay or non-delivery of the message, while the matter is still within the memory of witnesses. In view of the number of telegrams constantly passing over the wires, some such stipulation is absolutely necessary to protect the company from imposition. It is not a statute of limitations restricting the time within which action may be brought. This stipulation has been held reasonable in many decided cases cited by Freeman in his Notes, on page 471, 71 Am. Dec., as well as by a very recent case, *Telegraph Co. v. Dougherty* (Ark.) 11 Lawyers' Annotated Rep. 102. The period of sixty days has also been held a reasonable time in many cases (with scarcely any to the contrary), which are collected by Judge Thompson in his recent work, "The Law of Electricity," sec. 247. Such stipulation relieves the telegraph company from no part of their obligations. They are bound to the same diligence, fidelity, and care as they

would have been required to exercise if no such agreement had been made ;" since all that the stipulation requires is that the plaintiff should give notice of his loss "in season to enable the defendant to ascertain the facts." *So. Exp. Co. v. Caldwell*, 21 Wall. 264. There are, however, circumstances in which the stipulation for sixty days would be unreasonable, as was pointed out by Judge SPEER in the United States Circuit Court in a recent case, *Johnson v. Telegraph Co.*, 33 Fed. Rep. 362 ; as, for instance (as was the fact in that case, as in this), where a prepaid message has never been delivered. The court goes on to say that a stipulation of thirty days after the message is sent would be unreasonable in such case, for the failure of the company to deliver it would deprive the plaintiff, perhaps, of all notice that a telegram had been sent to him, and the company could prevent all redress by holding the telegram until after the time within which it is stipulated that the demand on them must be made. In the case before us it is set out in the complaint that the company "contracted for special delivery, and took the charges therefor," and that the message had never been delivered. The plaintiff has made no demand before suit brought, but the general rule that the commencement of an action is equivalent to a demand applies to cases of this kind. *Thompson on Electricity*, sec. 256. If, therefore, the action was begun within sixty days after the knowledge by the plaintiff of the failure to deliver the message, it would be such compliance with the stipulation as could be required in a case where a message was not delivered at all. If not brought within such time, the plaintiff is barred by his own negligence in not presenting his claim within the specified time. It does not appear in the complaint when such knowledge came to the plaintiff, but it does appear therein that the message has not been delivered at all. Hence the demurrer because the plaintiff did not present his claim within sixty days after the message was sent was properly overruled. If defendant wishes to insist that plaintiff did

not give notice of his claim within sixty days after knowledge of the non-delivery, he must set this up by answer.

It appears on the complaint that the telegram was sent by his sister, whom the plaintiff had left in charge of his house in Indiana (his wife being dead), in regard to the illness of his daughter; its cost was prepaid out of plaintiff's funds, and it was directed to his father, at whose house, in this State, he was on a visit, "for the use and benefit," it is alleged, "of the plaintiff;" and defendant contracted to deliver it at such house by special delivery. The telegram requested the father to tell the plaintiff to come home; that his daughter was very ill. The plaintiff could, therefore, maintain the action, both because the sister was his agent for the purpose of sending the telegram, and also because the plaintiff was the beneficial party in the contemplation of the contract of sending the message, since it was on its face sent for his benefit, and he was the party who would be injured by its negligent delay or non-delivery; and it is averred that the defendant received the message to be transmitted "for the use and benefit of" the plaintiff. The demurrer on the second and third grounds was therefore properly overruled. *Young v. Telegraph Co.*, 107 N. C. 370; *Telegraph Co. v. Adams*, 16 Am. St. Rep. 924; *Burton v. Larkin*, 36 Kan. 246.

Affirmed.

NOTE.—See INDEX to this and to previous volumes, title "Limiting Time;" also "Notes" on said subject.

North Carolina telegraph cases, earlier than the three last above, may be found in vol. 2, at pp. 684, 690, 699.

THE WESTERN UNION TELEGRAPH COMPANY v. C. P.
STEVENSON.

Pennsylvania Supreme Court, Oct. 7, 1889.

(130 Pa. 443.)

LIMITING LIABILITY.—UNREPEATED MESSAGE.—WAIVER OF STIPULATION.
—STOCK QUOTATIONS.

A rule of a telegraph company, restraining its responsibility for the accuracy of messages transmitted over its lines to such as are repeated, is reasonable and binding upon persons knowing its existence, unless waived by the company.

If a telegraph company having printed blanks containing a stipulation limiting its liability as to unrepeatd messages, dispenses with the use of such blanks, it is proper for a jury to determine whether it did not thereby intend to waive said stipulation and rule.

A telegraph company contracting to furnish stock quotations is bound to furnish them accurately, and liable for loss sustained by its failure to do so.

Case of this series cited in opinion : *Passmore v. Tel. Co.*, vol. 1, p. 168.

ERROR to Court of Common Pleas of McKean county.
Action for a balance due on account of telegraph service.

The defendant claimed two set-offs; one for negligent error in transmitting a dispatch; the other for an erroneous stock quotation, given pursuant to a contract. Further facts sufficiently appear in the opinion.

J. B. Chapman and *Silas W. Pettit* (with them *W. B. Chapman*), for plaintiff in error.

J. W. Lee (with him *F. W. Hastings* and *J. S. Criswell*), for defendant in error.

CLARK, J.: The defendant, C. P. Stevenson, at the time the matters involved in this suit occurred, was a member

of the Bradford Oil Exchange, and was engaged in buying and selling oil on his own account, and as a broker for others. The Western Union Telegraph Company, for a certain stipulated sum per month, agreed to furnish him accurate quotations of the price of oil from the exchanges in New York and Oil City. The oil market, being exceedingly sensitive, was subject to the most frequent, indeed most momentary, changes; and these changes, it would seem, varied slightly in the various markets, so that a person might at times, by carefully noting the quotations, buy in one market and sell in another. Transactions in the exchange were very rapid, and were noted generally upon mere memoranda until the close of the day's business. Success in buying oil in one market, to sell in another at profit, therefore rested wholly in the accuracy of these quotations upon which the dealer is necessarily obliged to depend.

Acting upon these quotations the defendant had various transactions in the purchase and sale of oil, which were conducted by telegrams transmitted over the plaintiff's lines, for which telegrams he paid, or agreed to pay, at certain specified rates.

* * * * *

The defendant alleges, as the first matter of the defense to the plaintiff's claim, by way of set-off, that on the morning of the 8th of July, 1885, he had on hand about 97,000 barrels of oil; that the market at first advanced, and he bought 40,000 more; that the market then indicated a break, and he gave to the company a verbal message to his agent at Oil City, to sell 50,000 barrels at 97 3-4; that the company failed to send the message as directed, but instead negligently sent a message to the agent to *buy* 50,000 at that price; the market price being about 97 to 97 1-4. He says he called the company's attention to the error at the time, and that his actual loss in the transaction was \$178.75. That the order dictated to the messenger was an order to *sell*, and not to *buy*, is established by the verdict of the jury, and the case must be considered upon the assumption of this fact. As against this claim of the defendant, the

plaintiff interposes the rule of the company printed at the head of their message blanks, to the effect that "the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same," etc. That the company may make reasonable rules, not inconsistent with the public good, affecting the measure of their responsibility in the ordinary course of telegraphy, is settled in *Passmore v. Telegraph Co.*, 78 Pa. 239. In that case, this court held, adopting the language of Judge HARR, that the rule or regulation now in question was not so far contrary to private interests or to the public good as to justify a court of justice in pronouncing it invalid.

"A railway, telegraph or other company," says the learned judge, "charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss, in the event of accident, and declare, if these are not observed, that the injured party shall be considered in default and precluded by the doctrine of contributory negligence." In the case at bar, however, the ordinary blanks upon which these regulations and restrictions were printed were not used, and the manner of conducting the business was somewhat peculiar. The great number and variety of transactions, and the rapidity with which they were necessarily conducted, gave occasion for a large amount of telegraphic communication of a complex character. Momentary changes in the market demanded the utmost dispatch in telegraphic communication; written messages were dispensed with in the business of the exchange. All the messages were given to the operator verbally; not one in a thousand was written. The members of the exchange, standing about the ring, whispered the messages they wished to send into the ear of a messenger boy employed by the company, and he communicated the message to the operator. For a part of the time, they were conveyed through a speaking tube from the

defendant's room to the ear of the operator. The exigencies of the business were such as to require that the usual methods of procedure should be dispensed with; there was no time to write the messages. The company would appear to have undertaken to transmit these messages correctly without reducing them to writing, either at the place of reception or delivery; the company received them orally and delivered them orally. The business, as it was conducted in the exchange, compared with the general and ordinary business of the company, was special and peculiar, and it was a question for the jury whether or not, under the circumstances, the company, by dispensing with the use of the blanks, did not intend to relieve their patrons from the stipulations contained therein. Such an inference might fairly be drawn from the extraordinary manner in which the business was conducted. We cannot say there was no evidence to justify such an inference. If there was a rule of the company by which its responsibility for the accuracy of messages transmitted over its lines was restricted to such as were repeated, and that any claim for damages must be made in writing within sixty days, the defendant was bound by such rules, if he had any knowledge of them, and they had not been waived or dispensed with by the company in its dealings with the defendant. These were questions of fact which were properly submitted to the jury.

The defendant further claims damages sustained by reason of a misquotation of the market at Oil City. On August 3, 1885, oil at Oil City was quoted to the defendant at 99 and a fraction. Relying upon the accuracy of this quotation, the defendant ordered his agent at Oil City to sell 90,000 barrels. It turned out, however, that the quotation furnished was inaccurate, and the loss was \$713.35. As the company had contracted to furnish the defendant the quotations of the New York and Oil City markets, it was bound to furnish them with accuracy, and the defendant was justified in relying upon them. The questions bearing upon this branch of the case have already

Telegraph Co. v. Adams.

been considered, and we do not wish to repeat what has been said.

We think the learned judge of the court below was right in his instructions to the jury, and the

Judgment is affirmed.

NOTE.—See INDEX to this and to previous volumes, title "Limiting Liability;" also "Notes" upon said subject.

Earlier Pennsylvania telegraph cases are reported vol. 2, pp. 706, 710, 716. See also note to last named case at p. 720.

WESTERN UNION TELEGRAPH COMPANY V. F. E. ADAMS.

Texas Supreme Court, Dec. 20, 1889.

(75 Tex. 531.)

DELAY OF TELEGRAM.—DAMAGES.—RIGHTS OF ADDRESSEE.

In an action for damages for injury caused by delay of a telegram, summoning a sister to the death bed of her brother, it is not necessary, to bring the case within the rule that only such damages as are naturally within the contemplation of the parties may be recovered, that the operator at the transmitting office should have been apprised of the relationship.

The addressee of a telegram has a cause of action in such a case, not on the principle of agency of the sender or payment by him of the price of transmission, but because he is the person for whose benefit the message was transmitted, and who is injured by the default of the company.

While not very important, it is not improper in such a case to allow proof of evidence of mental distress of plaintiff's wife caused by the delay of the telegram.

Prompt delivery having been an essential element of the contract, default in that respect warrants a recovery of the sum paid for transmission.

Case of this series cited in opinion: *Atkin v. W. U. Tel. Co.*, vol. 1, p. 121.

APPEAL by defendant below, from judgment of District Court, Henderson county. Facts stated in opinion.

Stemmons & Field, for appellant.

Richardson & Watkins, for appellee.

HENRY, Associate Justice. Appellee brought this suit to recover damages for defendant's delay in delivering the following message:

“WACO, Oct. 12th, 1887.

To F. E. Adams, Athens: “Clara, come quick. Rufe is dying.

[Signed] O. M. SIMMONS.”

His allegations are that said message was delivered to appellant's agent at Waco about 10 o'clock of said day, and that the message was not delivered to appellee until shortly before noon on the 13th day of October, 1887; that appellee was a merchant in Athens, residing there, doing business in the post-office building, within one hundred yards of the defendant's office, and on the public square; and that his residence was within one hundred yards of defendant's office; that appellee was well known to the residents of said town; that there were then two trains daily from Athens to Waco, one at 10.50 in the evening, the other at 7.05 in the morning; and that on the morning of the 13th of October there was an accommodation train which left Athens for Waco at 10 o'clock; that appellee's wife took the first train going to Waco after receiving said message, arriving at Waco on the morning of October 14; that when she reached Waco her brother was dead, and his body had been sent to a distant part of the State for burial; that they were compelled to take another train to the place of burial. Her brother died about 6 o'clock in the evening of the 13th; that, had the message been promptly delivered, appellee's wife could have reached her brother in time to have been with him 14 hours before his death, and, if the message had been delivered before either of the trains on the morning of the 13th, she could have been with him at least 6 hours before his death; that by reason of appellant's failure to promptly deliver said telegram, and of her being deprived of being with her brother in his last sickness, she suffered great anguish, pain of mind, and was prostrated

and broken down in body and mind, and was damaged in the sum of \$5,000; that plaintiff repaid Simmons the amount he paid for transmitting the telegram.

To this appellant answered by general demurrer and general denial. The general demurrer was overruled. The trial resulted in a verdict and judgment in favor of appellee for the sum of \$2,000.40.

The evidence supported the pleading.

Appellant's proposition, under its first three assignments, is "that the message did not disclose that the relation of brother and sister existed between 'Rufe' and 'Clara,' nor do the allegations in the petition disclose that appellant had notice of the relationship existing between them at the time it contracted to transmit said message; and, by reason of the want of notice of this fact, appellant can not be held liable for the damages sued for herein."

The rule insisted upon by appellant is too restricted to be safely applied to communications sent by the electric telegraph.

Plaintiff seeks to recover damages on account of mental pain suffered by his wife because of her inability to be with her brother when he was dying. The allegations and the evidence show that her failure to be with him was on account of her failure to receive information of his condition in time to reach him by the means of conveyance that were at her command. It is difficult to conceive of any form of expression that would have more accurately conveyed to her the information intended than would that used in the telegram, had it been delivered to her. If any diligence had been used for its delivery when it reached its destination, she would not only have known the condition of her brother, that it was intended to communicate, but would have known it in ample time to have reached him while living and conscious.

The mental pain suffered by her on account of being deprived of this privilege is recognized by the law as a ground for the assessment of damages against defendant, if it was induced by its negligence. The contention of defend-

ant, in effect, is that it can only be held liable for such damages as may be supposed to have been in the contemplation of the parties if the telegram was delayed in its delivery, and that no damage can be held to have been in contemplation of the defendant not suggested by the language of the dispatch, and that all that could be gleaned from this dispatch by its agents was that some person at Waco wanted some person at Athens, named Clara, to come quickly to Waco, because some person named Rufe was dying.

It seems to be well settled that telegraph companies are not charged with knowledge of the importance of delivering cipher dispatches. As, in the nature of things they can not know the contents of such telegrams, that mode of expression being adopted to keep them from knowing, the rule is a just one that preserves them from the responsibilities that such knowledge would impose on them.

There seems to be an effort to extend this rule beyond the occasion for it, and to practically make all telegrams expressed in abbreviated language cipher dispatches.

We think a distinction in this respect must be made between messages couched in terms intended to conceal their meaning and such as have no such purpose, but are intended to convey information by the use of no more words than are necessary, when given their accustomed meaning.

It is well known to the public, and can not be unknown to telegraph companies, that the utmost brevity of expression is cultivated in correspondence by telegraph. It is as well known that that mode of communication is chiefly resorted to in matters of importance, financially and socially, requiring great dispatch.

When such communications relate to sickness and death, there accompanies them a common sense suggestion that they are of importance, and that the persons addressed have in them a serious interest.

It would be an unreasonable rule, and one not comporting with the uses of the telegraph, to hold that the dispatcher will be released from diligence unless the rela-

tions of the parties concerned, as well as the nature of the dispatch, are disclosed.

When the general nature of the communication is plainly disclosed by its terms, instead of requiring the sender to communicate to the unwilling ears of the operator the relationship of the parties concerned, a more reasonable rule will be, when the receiver of the dispatch desires information about such matters, for him to obtain it from the sender, and, if he does not do so, to charge his principal with the information that inquiries would have developed.

A witness was permitted to testify that Mrs. Clara Adams, while waiting for a train to Waco, after the message had been delivered to her, seemed to be in great distress, and said that she would give everything that she possessed to see her brother, and talk to him, before he died.

As the jury would be instructed that they might, in assessing damages, include her mental anguish in their estimate, it was doubtless thought that evidence of her mental condition, including expressions of it, at the time, might be given. As juries may, from their own knowledge and experience of human nature, estimate damage proceeding from that cause without any evidence, it is not important to produce it, and when produced it ought not, as a general rule, to have a controlling effect; and yet we are not able to see why the fact that mental anguish was felt, and was exhibited by speech or otherwise, may not be proved for what it may be worth. It at least furnishes no ground for setting aside a verdict that might be sustained without any evidence as to the existence or degree of mental pain. 1 Greenl. on Ev., section 102; 1 Whart. on Ev., sections 268, 269.

It is urged that "the court erred in that part of its charge wherein it instructed 'that if such telegram was sent by Simmons for the benefit of Mrs. Clara Adams, and that she has paid back the charges for sending it, then the husband would have a legal right to sue for breach of the

contract,' etc., because, first, defendant had no notice the contract was made for Clara Adams; and, second, had no notice or information that 'Clara,' named in the message, meant 'Clara Adams,' the wife of the plaintiff.

If, in fact, the message was sent for the benefit of Clara Adams, and she was the damaged party, we can see a good reason why her husband may not maintain the action. *Aiken v. Tel. Co.*, 5 S. C. 389; *Tel. Co. v. Dryden*, Pa. St. 303; *Ellis v. American Tel. Co.*, 13 Allen, Shearn & Redf. on Neg., p. 642.

The party to be in fact accommodated, benefited, served holds the beneficial interest in the contract. That one sustains damage from its breach, a right of action arises in its favor. We do not attach importance to reimbursement of the fee for sending the dispatch to the party who paid it. Unless a right of action exists independently of that, it cannot be maintained. If a party sending and paying for the dispatch was not, at the time of performing those acts, the agent of the sender, he cannot be afterwards made such, so as to give a right of action for large damages, by being refunded the fee paid for the dispatch. At most, all that that transaction can amount to in any case, will be to give to the party that refunded the cause of action for the amount refunded, in a court having jurisdiction of it. If it is paid under such circumstances as to become a debt from the person for whose use the dispatch is sent to the sender, the collection of it will be between themselves; and with that the corporation can have no concern. If it is refunded by the party having otherwise a cause of action against the corporation, it may be included and recovered in the suit brought for the other cause.

We think the question as to who may maintain a suit for damages for the breach of contract does not depend upon the payment of the fee, nor upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the dispatch is sent, nor upon who in fact was to be served, and who is damaged.

If it was intended to serve the receiver, and he is

the act, we are unable to see why the telegraph company should be excused from the consequences of its neglect to discharge its own duty by reason alone of its ignorance of the relations that may exist between the sender and the receiver of the message.

If the sender, from motives of friendship or any other cause, is willing to confer upon the receiver a benefit, and he is willing to accept it, and out of the transaction there results damage for somebody to receive, and for the corporation to pay, the want of the technical relationship of principal and agent between the other parties ought not to enure to the benefit of the telegraph company, to the exclusion of the only party for whose use the other parties intended the transaction.

A charge to the jury that plaintiff could recover the toll paid for transmitting the message is objected to upon the ground that, as defendant performed its contract for transmission and delivery of said message, a delay in its execution does not authorize a recovery of the money paid for the performance of the contract. No authorities are quoted in favor of this proposition, and we know of none. A prompt delivery was of the essence of the contract; and a failure in that respect was such a breach of it as to authorize the recovery back of the consideration paid for it, if a right to do so could be maintained in other respects.

It is contended that "the court erred in not setting aside the verdict because it is excessive in amount; because if the telegram had been promptly delivered, plaintiff's wife could not have reached her brother until after he became unconscious." The facts do not sustain this assignment, and it therefore becomes unnecessary to comment upon it in other aspects.

We find no error in the proceedings for which we think the judgment ought to be reversed, and it is affirmed.

Affirmed.

NOTE.—See INDEX to this and prior volumes, titles "Damages," "Receiver or Addressee."

See note to *W. U. Tel. Co. v. Nations*, *post*.

WESTERN UNION TELEGRAPH COMPANY v. L. F.

Texas Supreme Court, April 29, 1890.

(77 Tex. 88.)

ERROR IN TELEGRAM.—LIMITING LIABILITY.

A stipulation in a telegraph blank, limiting the liability of the upon unrepeatd messages to the amount paid for transmiss valid.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Neill*, vol. *Womack v. W. U. Tel. Co.*, vol. 1, p. 454; *W. U. Tel. Co. v. E* 1, p. 715; *Gulf, &c. Railway Co. v. Miller*, vol. 2, p. 781.

ERROR from District Court, Callahan county.

Stemmons & Field, for plaintiff in error.

AKER, Presiding Judge: There was a deed c against the property of L. Hearne for \$25,000, which terms, became due at the option of the holder upon in the semi-annual payment of interest thereon for t after the maturity thereof. A payment of interest due on the 1st day of December, 1886, which Hear unable to meet in full; and it was agreed that he have until the 28th day of January, 1887, to pay t ance of \$500, or deposit it in bank.

The money was deposited in bank on the 28th January, 1887, and the following message was prepar signed by the cashier, and delivered to Hearne promptly delivered it to the agent of the telegrap pany at Baird to be transmitted and delivered to Chase, the trustee and agent of the beneficiary of th of trust, at Fort Worth:

“January 28

“To E. E. Chase, Fort Worth:

“Return note left by Hearne. Draw for \$500.

“A. G. WILLS, Ca

The message when delivered to Chase at Fort Worth read as follows :

" To E. E. Chase, Fort Worth :

" Return note left by Hearne. Order \$500.

" A. G. WILLS, Cashier.

This suit was brought by Hearne to recover damages alleged to have resulted from the error committed in transmitting the message by substituting the word "order" for "draw." There was verdict and judgment for plaintiff for \$25,000, from which the defendant prosecutes this writ of error.

There are several important questions raised by the assignments of error, but we will consider only one of them, as it controls the disposition of the case.

By the terms of the contract for the transmission of the message, it was expressly stipulated that the defendant company should not be liable for errors in transmission of unrepeatd messages beyond the amount of tolls paid thereon. The message was not repeated. We think it should now be considered settled in this State that this limitation of liability by special contract is valid and binding, and that no recovery can be had for an error committed in transmitting an unrepeatd message unless it be "shown by direct testimony, or by the facts and circumstances of the case, that the error was caused by the misconduct, fraud, or want of due care on the part of the company, its servants or agents." *Tel. Co. v. Neill*, 57 Tex. 283; *Womack v. Tel. Co.*, 58 Tex. 176; *Tel. Co. v. Edsall*, 63 Tex. 668; *Railway v. Wilson*, 69 Tex. 739.

In the Edsall case it is said that in the absence of a special contract limiting liability, proof of the error would make a *prima facie* case of negligence, and put the company under the burden of showing that the error resulted from some excusable cause. The rule here announced will probably be of rare application, as telegraph companies

require their patrons to subscribe to a special contract in every instance.

We are of opinion that the judgment of the court below should be reversed, and the cause remanded.

NOTE.— See note to *W. U. Tel. Co. v. Nations*, post.

WESTERN UNION TELEGRAPH COMPANY v. A. YOUNG

Texas Supreme Court, May 9, 1890.

(77 Tex. 245.)

DELIVERY OF TELEGRAM.

In case of a telegram addressed to one person in care of another, the company has done its full duty when it has tendered it to the person whose care it was sent, although such person refuses to accept it.

APPEAL by defendant below from judgment of District Court, Grayson county. Facts stated in opinion.

Stemmons & Field, for appellant.

GAINES, Associate Justice: This action was brought by defendant in error to recover of plaintiff in error damages for an injury to the feelings of his wife, alleged to have resulted from the failure of the company to deliver to her a telegraphic message informing her that her mother was dying. It was claimed that by reason of the failure to deliver the message plaintiff's wife was deprived of the opportunity of attending her mother's funeral, and that she was thereby caused great mental distress.

The message was directed to "Mrs. N. Young, care W. R. Henry & Co., Fort Scott, Kansas." The evidence showed that Mrs. Young did not receive the dispatch until

it was too late for her to reach the place of her mother's death before the burial. But there was evidence to show that on the morning of the day it was received for transmission it was delivered to W. R. Henry, of the firm of W. R. Henry & Co., and that he declined to forward it, and handed it back to the messenger.

The court instructed the jury, in effect, that, if the defendant's agent at Fort Scott tendered the message to W. R. Henry, and he declined to receive it, and gave the messenger such directions as would have enabled him to find plaintiff's wife by the exercise of reasonable diligence, then it was the duty of the agent to use such diligence to find and deliver the message to her. We think the court erred in giving this instruction. The liability of the company must be determined by the terms of its contract. Its obligation was not to deliver it to W. R. Henry & Co. and Mrs. Young, but to deliver to them as her agents, properly addressed to her, to be dealt with by them as they deemed best. The direction to "Mrs. N. Young, care of W. R. Henry & Co.," has the same meaning and legal effect as it would have had if the direction had been "to W. R. Henry & Co., for Mrs. Young." The company contracted to deliver to W. R. Henry & Co. for the benefit of plaintiff's wife, and when they delivered to a member of that firm their liability was at an end. The court should have so charged the jury.

The other questions presented by the brief of the plaintiff in error have been so frequently decided by this court adversely to its contention that they require no consideration.

For the error in the charge of the court which we have indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

NOTE.—See note to *W. U. Tel. Co. v. Nations*, post.

WESTERN UNION TELEGRAPH COMPANY v. W. P. CULBERSON.

Texas Supreme Court, Dec. 18, 1890.

(79 Tex. 65.)

DELAY OF TELEGRAM.— LIMITING TIME TO PRESENT CLAIM.

A stipulation in a night message blank requiring claims for damages to be made in writing within thirty days from the date of transmission is valid, and is not affected by any oral statement by the operator when the message was presented that he could not send it that night, but would do so the next morning — the point claimed being that it then became a day message, as to which the time limited for presentation of claims was sixty days.

Case of this series cited in opinion: *W. U. Tel. Co. v. Rains*, vol. 69, p. 697.

APPEAL by defendant below from judgment of District Court, Cass county.

A. H. Field, for plaintiff in error.

W. P. McLean and *O'Neal & Eberhardt*, for defendant in error.

GAINES, Associate Justice: This suit was brought by the appellee against the appellant to recover damages resulting from a failure on part of the defendant corporation to make prompt delivery of a message informing the plaintiff of the serious illness of his mother. There was a delay of ten days in delivering the dispatch, and the plaintiff, upon receipt, went at once to his mother's bedside, found her unconscious, from which condition she never recovered. She died within about one hour after his arrival.

The message was written upon one of the company's blanks and was signed and handed to its agent for trans-

mission by a brother of the plaintiff. The blank was intended for night messages, and contained a stipulation to the effect that the company should not be liable for damages resulting from the non-delivery or for delays in the delivery of the dispatch, unless the claim for such damages should be "presented in writing within thirty days after sending the message." Just below the conditions, and just above the message, were the following words: "Send the following night message, subject to the above terms, which are hereby agreed to." The court found that the plaintiff's claim for damages was not presented until April —, 1889, which was more than thirty days after the message was delivered for transmission, and more than thirty days after the damages accrued.

The message was presented for transmission at night, but the agent of the company informed the sender that it could not be sent that night, because the company's offices were then closed by reason of its being Sunday. It was then agreed that it should be delivered next morning. The price paid was twenty-five cents, which was stated in the blank to be the price of a night message and the lowest charge for any service.

The court found that "said telegram was written on a night message blank of defendant company," but seems to have concluded that, by reason of the agreement to send it next day, the conditions indorsed upon the blank did not become a part of the contract. This, however, is not clear. The finding which bears upon this question is "that if the contract with defendant company and Dugger Culberson was that the telegram above referred to was a night message, paid for as such, then that the stipulation printed on the top of the said blank telegram in this case signed by Dugger Culberson, requiring suit to be brought in case of default, etc., was and is an unreasonable time in which suit could be brought in this case." There is no limitation in the contract as to the time within which a suit for damages for its breach should be brought. The trial judge doubtless referred to the provision which stipulated that the

claim for damages should be presented within thirty days after sending the message.

We think the court erred in holding that the stipulation was not binding. This court held, in the case of *Western Union Telegraph Company v. Rains*, 63 Texas, 27, that such a stipulation for the presentation of the claim for damages was not unreasonable, and was obligatory upon the parties. In that case the limit was sixty days. In *Gulf, Colorado & Santa Fe Railway Co. v. Trawick*, 68 Tex. 314, it was held that a stipulation in a bill of lading for the shipment of cattle, to the effect that the shipper should not be entitled to recover damages for a breach of the contract unless suit should be brought in forty days, was valid.

In the present case the time stipulated within which the claim should be claimed is shorter, but the principle is the same. No reason is seen why the time was not amply sufficient for the party injured to make out in writing his claim for damages, and to present it to the company. The damages which the plaintiff has suffered were as well known to him within three days after the message was sent as they could have been at any future time, and the space allowed afforded an ample opportunity for making the demand.

But it is urged that the court's finding upon this question was not material, for the reason that the agreement to deliver the message on the morning of February 25th made it a day message, and that the answer discloses that as to such messages sixty days were allowed to present the claim for damages. In this proposition we do not concur. If the agreement between the agent and the sender that the dispatch should be delivered on the morning of the 25th, had made a change in the contract, it would have altered it in that particular only, and would have left its other stipulations unimpaired. These provisions were as reasonable when made parts of contract to deliver a message in the day-time as when incorporated in a contract to deliver at night. But the written contract only bound the company to a delivery "not earlier than the morning of the next ensuing

Telegraph Co. v. Rosentreter.

business day." The verbal agreement to deliver next morning did not change its legal effect.

Upon the case made the plaintiff was not entitled to recover, and the judgment is accordingly reversed and here rendered for appellant.

Reversed and remanded.

NOTE.—See note to *W. U. Tel. Co. v. Nations*, *post*.

WESTERN UNION TELEGRAPH COMPANY V. OTTO ROSEN-
TRETER.

Texas Supreme Court, March 24, 1891.

(89 Tex. 406.)

DELAY OF TELEGRAM.—LIMITING LIABILITY.—NOTICE OF IMPORTANCE.

A stipulation in a telegraph blank that "the company will not be liable for delays arising from unavoidable interruption in the working of its lines" refers to such delays as are caused by electrical disturbances or other causes beyond the control of the company, and will not absolve the company when the 'interruption' of its regular business is due to the fact that it has turned over its lines to the exclusive use of a railroad company, during the time in question.

To render a telegraph company liable in damages for delay of a telegram announcing death, it is unnecessary that the relationship between the addressee and the person deceased should be disclosed by the message.

Cases of this series cited in opinion: *Gulf, &c. Co. v. Miller*, vol. 2, p. 781; *W. U. Tel. Co. v. Neill*, vol. 1, p. 852; *W. U. Tel. Co. v. Edsall*, vol. 1, p. 715; *W. U. Tel. Co. v. Scircle*, vol. 1, p. 788; *State of Nebraska v. Nebraska Teleph. Co.*, vol. 1, p. 700; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *W. U. Tel. Co. v. Yopst*, vol. 2, p. 558; *W. U. Tel. Co. v. Adams*, ante, p. 768; *W. U. Tel. Co. v. Tyler*, vol. 1, p. 115.

COMMISSIONERS' decision. Appeal from District Court, Washington county.

TEXAS, 1891.

Telegraph Co. v. Rosentreter.

Stewart & Stewart, for appellant.

Searcy & Garrett and *S. G. Ragsdale*, for appellee.

MARR, Judge: The statement of the case as made appellant's brief, with some slight alterations which have made, will disclose substantially the case. So omissions therein will be hereinafter supplied from record. The statement is as follows:

"This suit was begun by Otto Rosentreter filing petition on February 13, 1890, in the District Court Washington county, Texas, asking for \$2,000 damages against the Western Union Telegraph Company for grief, disappointment and mental anguish suffered by said Otto Rosentreter, caused by the Western Union Telegraph Company (negligently) delaying to promptly transmit (and deliver) a certain telegraphic message from town of Lyons, in Burleson county, Texas, to the appellant in the city of Brenham, Texas, whereby the said Rosentreter failed to reach Lyons in time to attend the funeral of his sister Emma, and 'give comfort and consolation to aged mother in an hour of great disappointment.' The message was filed for transmission at Lyons, Texas, April 7, 1889, it being Sunday. The message was written by August Grabbo, and handed by him to defendant operator at Lyons, George A. Smith. It reads as follows:

'To Otto Rosentreter, care of Louis Grassmuck, Brenham:

'Emma died last night. Will be buried this evening.

'[Signed]

AUGUST SCHOPPE

"The message was handed to Operator Smith about eight o'clock on the morning of the 7th by August Grabbo, and at the time Smith told Grabbo that the wire was crowded with train orders, and also that it was Sunday, and the Brenham office was closed between the hours of ten o'clock A. M. and four o'clock P. M., so that the message would probably not be delivered before four o'clock that afternoon. Grabbo replied to do the best he could with. Operator Smith did not know Otto Rosentreter, August Schoppe, or Emma, or what relationship, if any, existed

between the Emma mentioned in the message and Otto Rosentreter, or that appellee had an aged mother to comfort; and nothing was said at the time of filing the message as to any relationship, or that Rosentreter was expected up on the noon train; August Grabbo testifying that he thought the message explained itself.

"Operator Smith testifies that he remained at his instrument from eight o'clock A. M. until two o'clock P. M., endeavoring to transmit the message, with the exception of a short time he was attending to the mail and his duties as agent; but was unable to obtain control of the wire to transmit the message until two P. M. on account of its being in charge of the train dispatcher, who was constantly using it for sending train orders; there being a rush of stock. The message had to be sent to Galveston, and 'relayed' to Brenham. The Brenham office was closed from 10 A. M. until 4 P. M. The message reached Brenham about 4 P. M., and was promptly delivered to Louis Grassmuck, and by him to appellee at 4.15 P. M.

"The train going from Brenham to Lyons left Brenham about eleven o'clock A. M., and reached Lyons, a distance of nineteen miles, in about forty-five minutes. Emma, the sister of appellee, died at her home about a mile from Lyons, at about six o'clock on the evening of the 6th of April, 1889, and the message, about the delay in the delivery of which this suit was brought, was not filed for transmission until about eight o'clock on the morning of the 7th of April, over twelve hours after the death of the said Emma. The appellee testified that he was living in Brenham, only nineteen miles from his sister, or a ride of only forty-five minutes, and that he had not visited his sister for about three months before her death, though he testified that he was expecting to hear of her death at any moment, and could easily have obtained permission of his employer to visit her; that he did not go to Lyons for several weeks after the death of his sister Emma, though he could have easily obtained the permission of his employer, Mr. Grassmuck, to do so. The cause was tried

by a jury, March 10, 1890, and verdict and judgment for appellee for \$1,000."

It is deemed proper to insert in this connection of the facts proved which are proper to be considered in the solution of the questions presented on this case. The following from the brief of appellee is found substantially correct.

"The telegram was delivered to the operator at a station nineteen miles from Brenham, at 8 o'clock and was delivered in Brenham at fifteen minutes past 9 A. M. The regular passenger train passed Brenham about 11.30 A. M., and arrived at Lyons about 1 P. M.

"The witness, August Schoppe, testified that Elizabeth, sister of appellee, died near Lyons on the evening of April 6, between 6 and 7 o'clock; that on the morning of the 7th of April he went to Lyons to send a dispatch to appellee; that he reached Lyons about 7 o'clock and found the telegraph office closed; that he called on August Grabbo, and requested him to deliver the message to the operator when he came down to the office; that this was postponed until evening, so that the appellee was not present.

"August Grabbo testified that he delivered the message to the operator as soon as the office was open, between 8 and 9 o'clock; that he went to the office, asked for the operator, wrote the message, paid him twenty-five cents, and asked him if he could send it, and he replied by saying he only had one instrument; that they only had certain days to work on Sunday; that the wire was crowded, etc.

"George A. Smith, the operator and witness for the appellant, testified that he remembered receiving the message from Grabbo, who requested him to send it as soon as possible. It was on Sunday, and the Western Union office at Brenham was open from 7 to 10 A. M., and from 1 P. M. That he had but one wire, and it was constantly in use by the dispatcher, who was using it all the time.

orders. I told Grabbo the office was closed during certain hours on account of it being Sunday, and that I did not think it could possibly be delivered before 4 or 5 o'clock, as it had to be relayed at Galveston, and I thought the Brenham office would be closed from 10 o'clock to 4. That he left his instrument about half an hour attending to the mail and his duties as station agent. The wire was crowded with railway business. We often have such a rush. That if the other office had been doing business in Brenham it might have been sent there. I could send a train order, but could not get the wire for messages. That the dispatcher controls the wire, and whenever he wants an office he calls them. He can deliver the wire to any office. Any office can communicate with him at any time. That ten minutes would be a reasonable time to send a message from Lyons to Brenham via Galveston. That he could have communicated with the depot at Brenham over the railway wire, but could not have handled Western Union business over it. That he did not try for this message. That the wire belonged to the Western Union Company. That he could have had communication with the dispatcher, who could have given him control of the wire to have sent this dispatch. That he did not try to get in communication with the dispatcher, and tell him that he had an important message to get off. An important message is a 'rush message.' A message announcing the death of a party is called a 'rush message.' This message announced a death. That he was both railroad agent and operator at Lyons, and his duties were somewhat double. From the telegram he thought they expected Otto to come on the train. That if he had had another wire communicating directly with Brenham, he thought he could have got the message off between 8 and 11 A. M. Since that time another wire has been put up."

Again, on the question of damages, it was proved that "the appellee was working for Louis Grassmuck in Brenham. His sister was in bad health, and he had made arrangements to be telegraphed for in the event of her

death. Appellee testified that he was very much disappointed and grieved at not being able to be present at the funeral of his sister. That he would not have missed it for anything in the world. The witness Grassmuck testified that he delivered the telegram to appellee; that he seemed very much grieved and distressed at not being able to be present at his sister's funeral; that they went down to the depot to see if he could get a freight train to go to Lyons on; that he could not get a freight train and he seemed very much distressed. He cried, and said he wished he could have gone. The witness August Schoppe testified he expected the appellee up on the train, and was at the depot to meet him, and that the funeral was put off until after the arrival of the train, so he could be present."

* * * * *

The fourth and seventh assignments of error may be considered together, as they relate to the same subject, viz. the refusal of the court to give the third and fifth special charges requested by the defendant. The first of the instructions is as follows:

"You are charged that the defendant can limit its liability in transmitting telegraph messages, sending them under certain conditions, which conditions must be assented and agreed to by the sender of the message. The company may limit its liability for delay caused by inability to work its wires from wire troubles or overcrowding the wires; and if you find that the message in question was written on a form containing a condition that the company would not be liable for delays arising from unavoidable interruption in the working of its lines, and said message was agreed to by the plaintiff by his agent writing the message on a blank containing said condition and signing the same then the company is not liable for any delay caused by the interruption in the working of its lines, if you find that there was any such interruption, and you will so find."

The second is to this effect: "The defendant company, being a telegraph company, can limit to a certain extent its liability; and if you find that the message in question was

written on a blank containing certain conditions, among others, that the company would not be liable in damages beyond fifty times the amount paid for sending the same, without the delay is caused by the misconduct, fraud, or want of due care on the part of the company, its servants or agents, and if you so find you will return verdict for plaintiff only for fifty times the amount paid for the transmission of the message in question."

It is doubtful if these assignments ought to be considered. We have searched the record in vain for the proof of any fact or state of facts that would render either of these charges applicable, even if it were conceded that they announce the correct rule of law. By nearly all of his witnesses the plaintiff proved the contents of the telegram upon which this action is based, viz.: "Emma died last night. Will be buried this evening," as we have before shown, but here the evidence stops, and as to any part of the telegram, or its conditions, if any, we find no proof in the statement of facts. The stipulations claimed by appellant as limiting the liability of the company we do find in the telegram as set out and made an exhibit to defendant's answer, but it does not appear that the defendant ever offered or attempted to offer them in evidence before the court or jury. The telegram is identified by several witnesses as the one sent to the plaintiff, but no mention is made of any other terms or conditions. The nearest approach thereto that we have been able to find is to be found in the testimony of August Grabbo, the man who wrote the telegram: "I took the message to Smith, the operator, at the request of August Schoppe. That is the message [identifying message attached to defendant's answer], and my hand-writing." This certainly does not prove the printed stipulations of the telegram relied on by the defendant, or that they were offered or introduced in evidence. We think it entirely clear as a matter of practice and of law that the identification of a written instrument for the purpose of introducing it in evidence is not equivalent to its introduction in evidence in fact before the

court and jury. This is, perhaps, an inadvertent omission in the preparation of the statement of fact, but nevertheless the proof does not appear to have been made.

We have, however, considered the charges under the facts of the case in view of the sixth assignment, which raises in substance the same question presented by the fourth assignment as to the sufficiency of the evidence in that regard to justify the verdict, but we do not believe that any of these assignments are well taken in the light of the evidence and issues in this case. The court below seems to have sufficiently guarded in its general charge to the jury, as we think, every right of the defendant on the question of negligence as an indispensable prerequisite to any recovery by plaintiff at all. The court charged the jury as follows:

"The question of diligence is one to be determined by the jury from all the evidence, and if you believe from the evidence that the defendant's agent was not guilty of negligence, but that he exercised reasonable care and diligence in getting said message through, then you will find for the defendant." *Railway v. Miller*, 79 Tex. 78; 21 Am. and Eng. Corp. Cases, 80.

Again: "The defendant would be bound to receive the telegram, if such was intrusted to its care, and transmit the same with *reasonable* diligence, and would be held to the exercise of such care and diligence as would be *reasonably* adequate to a faithful discharge of its duty."

Elsewhere in the charge the right of the plaintiff to recover is made directly to depend upon proof of negligence upon the part of the defendant or its agents and employees. This did not make it liable, as a common carrier would be, as an insurer. It therefore clearly appears that the fifth special instruction, as asked by defendant, was inapplicable — certainly unnecessary to any issue submitted to the jury, or presented in the plaintiff's petition, since, according to both the terms of the stipulation itself, and the requested instruction, the amount of the damages was not to be restricted to "fifty times the amount paid"

if "the delay" was attributable to the "want of due care on the part of the company, its servants or agents." Had the stipulation not contained this latter exception, it would have been unreasonable and void. *Telegraph Co. v. Neill*, 57 Tex. 291, approved in several later cases.

The stipulation contained in the third special instruction before noted, that "the company will not be liable for delays arising from unavoidable *interruption* in the *working* of its lines," does not, we think, fairly embrace the matter developed in the evidence as the defense. The "interruption" mentioned would most naturally refer to such as may be caused by electrical disturbances, or others beyond the control of the defendant. *Telegraph Co. v. Edsall*, 63 Tex. 674. The fact that the defendant's wire was on the day the telegram was delivered to it for transmission in the *uninterrupted* control and use of the railway company does not indicate any "unavoidable interruption in the working of its lines," or fall within the terms of the stipulation. It appears to us that to give the stipulation the construction contended for by appellant would render it unreasonable and void, if it is designed to have general application. Gray's *Com. by Tel.*, p. 79, sec. 50; 8 *Amer. & Eng. Corp. Cases*, pp. 1, 44, notes. Of course we are not discussing any supposed case—not shown to have influenced the defendant in this case—where to prevent collisions, wrecks, etc., the railroad company should for the time being be allowed the exclusive use of the wires.

On the Sabbath day in question, if we are to credit the operator to whom the message was intrusted, and who was the agent of both the defendant and the railway company, the Western Union Telegraph Company seems to have abandoned its franchise, and gone out of business, between the towns of Burton and Brenham, at least for that day, and turned over "its lines" to the exclusive dominion of a train dispatcher (at Galveston) of the railway company, and who, thus invested with autocratic powers, often craved, perhaps, by ordinary mortals, but rarely possessed,

appears to have done a "rushing" business, and worked the wire for all that was in it, to the utter exclusion of the public. Under such circumstances, it would be a little difficult to regard the railway company in the light strictly of an employer of the defendant company. This would seem also to meet the point made by appellant that it could not give preference to any person or corporation employing it. It certainly did on that day, however, give a decided and exclusive preference to the railway company.

We do not think that the law contemplates that a telegraph company, charged with the duty of faithfully serving the public to all reasonable extent, shall escape responsibility for its failure to perform that duty by such a shallow pretense, after it has received the telegram, and made a contract for its transmission. If it was the habit, not infrequently, as the testimony of the operator shows, for the railway company to usurp the defendant's wire with its consent, to the exclusion of every one else, then the defendant should have provided another wire to serve the public, or as many as were "reasonably adequate" to the discharge of the duty devolved upon it from the very nature of its organization and business. *Telegraph Co. v. Scircle*, 10 Am. & Eng. Corp. Cases, 615; *Railway Co. v. Smith*, 63 Tex. 327. If it failed to do this, that amounted to negligence, under such circumstances, regardless of any special stipulation. We do not wish to be understood as holding that it is the duty of the telegraph companies to provide as many wires as may be necessary to serve every individual promptly and at once, who may seek its service, but we do simply hold, under the facts of this case, that if the telegraph company allowed the railway to occupy its only wire for any considerable time to the exclusion of the public, then it should have provided another wire for the use of other employers, so as to afford equal, or at least reasonable, facilities to all. *Gray's Com. by Tel.* 79; *The State v. Telephone Co.*, 8 Am. &

Eng. Corp. Cases (Neb.), 1. Since the omission now complained of occurred, the company has put up another wire, and thereby apparently confesses that one only was inadequate.

This court in the case of *Western Union Telegraph Company v. Broesche*, 72 Tex. 654, administered a timely admonition to the appellant on account of the negligence of its agent at this very same Burton station in allowing its office to be closed, so that an important telegram received there was not delivered in a reasonable time. It was held that, although the message was received for transmission at the initial office "after the usual hours of closing the office at Burton," this constituted no defense to the action. We do not doubt the correctness of this decision, or that the principle therein announced—that, having received the telegram, it was bound to transmit it—is applicable to the present contention. In any event, the court was not required to select the isolated facts relied on by the defendant, and charge that they, *per se*, constituted a legal excuse. *Munn v. Illinois*, 94 U. S. 113.

The remaining portion of the sixth assignment not already disposed of relates to the effect of the regulation of the company that its office would "not be open from ten A. M. until four P. M. on Sunday," as testified to by the witness, Smith, of which regulation the sender was informed. The message, however (and which is termed a "rush message)," was in fact received by the agent for transmission about 8 o'clock in the morning, before the operation of the rule began. The court below gave the sixth special charge requested by defendant, to the effect that the defendant would not be liable for any delay occurring between those hours if the sender was informed of the regulation. This was certainly as favorable a presentation of the law on this subject as the appellant could legally demand under the facts of the case. It is evident that the telegraph company was not observing the Sabbath, but, on the contrary, allowed its wire to be kept red-hot, at least in the transmis-

sion of the railway's business, during the greater part of the entire day. The law beneficently endows telegraph companies with incapacity to violate the Sunday law by "sending and receiving telegrams" on that day, and no instance of the railroad alone. Gen. Laws. Reg. § 67; *Telegraph Co. v. Yopst*, 25 Am. and Eng. Cases, 519. The verdict of the jury is not against the law, and hence is not reversible on this particular.

What we have already said disposes of the fifth assignment of error.

The eighth assignment of error — that the court was in error in refusing the fourth special charge asked by defendant, to the effect that the telegram must, to be actionable for consequential damages, show on its face the relationship which existed between "Emma," the deceased, and the plaintiff — cannot be sustained under repeated decisions of the Supreme Court. The same question is presented in the ninth assignment, on the sufficiency of the evidence to sustain the verdict. If the importance of the telegram being put in the hands of the plaintiff, and transmitted and delivered reasonably appears from the facts in terms, that is sufficient, whether the precise relationship was indicated or not; but it may be remarked that a telegram very similar to the present one, viz., "Billie is very sick. Come at once," was held to sufficiently give notice of the relationship, or at least to put the company on inquiry. *Telegraph Co. v. Moore*, 76 Tex. 66; *Telegraph Co. v. Adams*, 75 Tex. 533; *Telegraph Co. v. Feegles*, 75 Tex. 537. To require the family pedigree to be inserted in telegrams announcing serious illness or death would be to deprive the greater part of the public of the benefits of telegraph, and the only apparent object of the requirement of such cases is, as was said by the Supreme Court of Illinois in regard to the "repeating" of messages to the telegraph company, "to increase the revenue of the companies." *Telegraph Co. v. Tyler*, 74 Ill. 170.

* * * * *

Affirmed.

Telegraph Co. v. Jones.

Stewart & Stewart argued a motion for rehearing for appellee. Motion transferred to Austin and there refused.

NOTE.—See INDEX to this and to prior volumes title, "*Limiting Liability.*"

See note to *W. U. Tel. Co. v. Nations*, post.

WESTERN UNION TELEGRAPH COMPANY v. J. C. JONES.

Texas Supreme Court, June 2, 1891.

(81 Tex. 271.)

DELAY OF TELEGRAM.—RIGHT OF ADDRESSEE.

In an action brought by the addressee for damages due to delay of a telegram announcing the expected death of the addressee's mother, *held*, that the question whether the sender was the agent of the addressee was properly submitted to the jury, under the evidence, even if that were a material fact. But that it was probably immaterial, since the contract was clearly made for the benefit of the addressee, in whom a right of action would therefore exist though he was not a party to the contract.

The evidence being conflicting as to whether the telegraph company operated the whole line over which the message had to pass, or whether it delivered the message to a connecting line, a verdict based on the former proposition will be allowed to stand.

Cases of this series cited in opinion: *So Relle v. W. U. Tel. Co.*, vol. 1, p. 348; *Reliance Lumber Co. v. W. U. Tel. Co.*, vol. 1, p. 466.

APPEAL by defendant below from judgment of District Court, Grayson county. Commissioners' decision. Facts stated in opinion.

Stemmons & Field, for appellant.

J. W. Finley and C. H. Smith, for appellee.

TARLTON, Judge (*Section B.*): Appellee, J. C. Jones, brought this suit in the District Court of Grayson county

to recover from the Western Union Telegraph Company, appellant, damages for the breach of its contract made by his brother, G. F. Jones, for the benefit of appellee, and as his agent, with the appellant, at Whitesborough, Tex., on May 10, 1886. The plaintiff's petition alleges that the defendant undertook, in consideration of fifty cents then paid to it, to speedily and correctly transmit and deliver to plaintiff the following message:

"WHITESBORO, Tex., May 10, 1886.

"To J. C. Jones, care of McDonald & Jones, Contractors and Builders, Brownwood, Texas:

"Mother is not expected to live but a short time.

"G. F. JONES."

That a reasonable time for the transmission and delivery of the message to plaintiff (who lived and had a place of business in Brownwood, and within the delivery limits) was one hour, but that, by the gross negligence of defendant, the message did not reach Brownwood until more than twenty-four hours after it had been received for transmission, and that on account of the failure of defendant to seek plaintiff, at his residence or place of business, the message was not delivered to appellee until May 17, 1886, when, before appellee could act upon it, he telegraphed to one Harper, at Whitesboro, near which place his mother lived, as to her condition, and after telegraphing a second time (the first dispatch, on account of the negligence of defendant, not having been delivered), he received a telegram from Harper on the evening of May 19, informing plaintiff that his mother died May 12, and was buried May 13, 1886; that, if the message had been promptly transmitted and delivered, he could have been present at his mother's death and burial; that he was thus, by the gross negligence of defendant, deprived of the companionship of his mother in her last moments, and has suffered great mental anxiety. The damages sought to be recovered are \$2 expended for messages, \$5 for loss of time, and \$15,000 because of the deprivation stated.

The answer of the defendant, in so far as it is the basis for the assignments of error herein, consists in: (1) General denial. (2) A plea that its lines of telegraph did not extend to Brownwood, but terminated at Austin, Tex.; that from Austin the telegram would be conveyed over the line of the Erie Telegraph & Telephone Company to Brownwood, a line of telegraph then owned and operated by a company other than the appellant, and over which the appellant had no control, management or connection, and that, under the contract by which it accepted the message, it was only bound to correctly and expeditiously transmit the message from Whitesboro to Austin, and there deliver it, as the agent of the sender, to the Erie Telegraph & Telephone Company, to be transmitted by this company to Brownwood, and there delivered; that, in compliance with its contract, defendant promptly and correctly transmitted the telegram from Whitesboro to Austin, and delivered it to the connecting line.

The jury returned a verdict for appellee for \$1,292, and, from the judgment therein entered, the defendant, after the overruling of a motion for a new trial, prosecutes this appeal.

In the first error assigned, complaint is made that the court submitted to the jury the question as to whether George F. Jones, in sending the message referred to, was the agent of the appellee, J. C. Jones. It is alleged that the submission of this matter was error, because there was no evidence that defendant had any notice, at the time it contracted to transmit the message, that George F. Jones was acting as the agent of plaintiff.

It is evident that the contract for the transmission of the telegram was made for the benefit of the appellee, and that the benefit to be by him derived from the knowledge to be communicated to him of the illness of his mother was not merely the incident, but the cause, of the contract. Under such circumstances, a right of action exists in the beneficiary, though he is not a party to the contract. Gray's Com. by Tel. secs. 66-67, citing *So Relle v. Telegraph Co.*, 55 Tex. 308; *Lumber Co. v. Telegraph Co.*, 58 Tex. 394. It

hence follows that the submission to the jury of the issue of agency could not have injured appellant, and, if erroneous, was harmless, since a right of action was in the plaintiff, whether he was or was not the principal of the sender. We think, however, that under the evidence, granting, as appellant contends, that it was necessary, before the plaintiff could maintain his suit, that the sender should be his agent, and that the defendant should be notified of the agency, these prerequisites were met, and the court was justified in giving the charge complained of. It was both alleged and proved that George F. Jones was the agent of the plaintiff in contracting with the defendant for the transmission of the telegram. Appellant was told to deliver the message at once, and it received full compensation therefor. The intelligence that the telegram contained was urgent and important; no doubt could be entertained that it was for the benefit of the addressee. It was reasonably apparent that the person referred to was the mother of the addressee. We think that the verbiage of the message, and the facts and circumstances surrounding its transmission, and brought to the knowledge of the appellant, notified it of the fact that the sender was acting for the benefit of the addressee, and as the agent of the latter.

In its second assignment of error the appellant complains that the court in its charge assumed it to be the duty of the defendant to deliver the message to plaintiff at Brownwood, Tex., and that such assumption was error, because (1) defendant had no line or office at Brownwood; (2) under its contract with George F. Jones, defendant only contracted to deliver the message to the connecting line, and then as agent of the sender, George F. Jones; (3) defendant's whole duty in regard to the message was correctly, expeditiously, and faithfully performed.

As shown by the record, one of the issues of fact to be determined by the jury was the question whether the defendant had an office or line at Brownwood, and operated the entire line from Whitesboro to Brownwood, or whether, in its operations with reference to messages for Brownwood,

it confined itself to delivering them to a connecting line at Austin, viz., the Erie Telegraph & Telephone Company. This issue arose out of the conflicting allegations of the parties, and the conflicting testimony of the witnesses on this point. Witnesses for the defendant testified that it had no office nor agent at Brownwood, nor interest in the line of the Erie company, which extended to Brownwood, but that messages received by the defendant for Brownwood were sent from Austin to Brownwood over a line operated exclusively by the Erie Company. Witnesses for the plaintiff, on the other hand, testified that appellant was doing business at Brownwood, receiving messages there, and thence transmitting messages on its own blanks; that its sign, sent and put up under its direction, was, when the message in question was sent and delivered, in front of its office at Brownwood. Evidently, with this conflict in the testimony in view, the court instructed the jury as to their duty if they should find "that the defendant was engaged in the business of sending telegraphic messages over wires operated and controlled by it from Whitesboro to Brownwood," and then proceeded with its charge as follows: "If you (the jury) believe from the evidence that the defendant did not own or operate the entire line from Whitesboro to Brownwood, but that it was necessary to deliver said message to a connecting line to reach its destination, then the defendant would not be liable for delay occurring after it had so delivered said message to such connecting line. But, to hold the defendant liable, it would not be necessary that it should have been the absolute owner of the wire the entire distance, for, if the business was done by it through its own agents, it would be liable, although it may have been done over the wire of some other company." We do not agree with the appellant that the charge contains the assumption complained of.

The remaining two assignments of error alike complain that the verdict of the jury is unsupported by the evidence "in that it finds damages against the defendant for the default of the connecting line." As above shown, the

evidence was conflicting as to whether there was a connecting line, in the sense of a line operated to the exclusion of the defendant. The charge of the court was accommodated to the opposing phases of the evidence on this issue. It embonied the proposition that the defendant would not be liable for the negligence of the connecting line, if there was one, and it tersely, fairly, and fully left to the jury the determination of the issue. The verdict of the jury, involving the finding that there was no such connecting line, is not without evidence to support it, and it should not be disturbed. *Montgomery v. Culton*, 23 Texas, 156; *Anderson v. Anderson*, 23 Texas, 641; *Jordan v. Brophy*, 41 Texas 284.

The judgment should be affirmed.

NOTE.—See INDEX to this and to prior volumes, title “Receiver or Addressee;” also “Notes” on said subject.

See note to *W. U. Tel. Co. v. Nations*, *post*.

WESTERN UNION TELEGRAPH COMPANY V. PARTHENA NATIONS.

Texas Supreme Court, Dec. 15, 1891.

(82 Tex. 539.)

DELAY OF TELEGRAM.—NOTICE OF IMPORTANCE.—DAMAGES.

A telegram in the words, “your step-father died this morning,” and signed by the plaintiff, was delivered to an operator at a telegraph office for transmission, and the operator was at the same time informed orally of the nature of the telegram and the necessity of prompt transmission. *Held*, that the company had sufficient notice that the message was for plaintiff’s benefit and was a summons to her son to come to her; and that a judgment in her favor was warranted, for the price of transmission and damages for mental suffering.

Cases of this series cited in opinion: *Reese v. W. U. Tel. Co.*, *ante*, p. 640; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815;

APPEAL by defendant below from judgment of District Court, Hopkins county. Commissioners' decision.

A. H. Field, for appellant.

B. W. Foster, for appellee.

GARRETT, Presiding Judge (*Section B*): Parthena Nations brought this suit against the Western Union Telegraph Company for damages consisting in injury to feelings arising from the alleged failure of the appellant to deliver a telegram to her son, S. H. Perry, announcing the death of her husband. She alleged that she was deprived of the aid, consolation and advice her son would have given her, and of his presence as a staff to uphold her in such a dire calamity; and that she was damaged in the sum of twenty-five cents paid for the transmission of the telegram, and in injury to her feelings.

There was a plea of general denial by the defendant.

No jury having been demanded, the law and the facts were submitted to the court, which rendered judgment in favor of plaintiff for the sum of \$300. Defendant excepted and gave notice of appeal, and the case is before us for revision upon proper assignment of errors.

The findings of fact which were filed by the judge, so far as they are pertinent to this appeal, may be summarized as follows:

Plaintiff was twice married. S. H. Perry, to whom the telegram was addressed, was a son by the first marriage, and resided in Sulphur Springs, Hopkins county. Plaintiff had been married to Mr. Nations about twenty years, and by him also had children. On November 6, 1887, she and her husband and their two children lived two miles from Anona, a railway station in Red River county, where defendant had a telegraph station. Defendant also had a telegraph station at Sulphur Springs. Mr. Nations died that day, early in the morning; and plaintiff sent Joseph Nations, her son, 17 years of age, and a neighbor, to Anona,

to telegraph for her son, S. H. Perry, and they imwent, and delivered to defendant the following

" ANONA,

" *To S. H. Perry, Sulphur Springs, Texas :*

" Your step-father died this morning.

" MRS. P.

They paid forty cents for the transmission of sage, which was the regular price. Joseph Nat the agent at the time that his father was dead, an wanted the telegram sent at once ; that it was i that it should be rushed through at once.

The message was sent at once, and was rec defendant's agent at Sulphur Springs by hal o'clock that morning, and he gave it to the messe for delivery. There was a negligent failure to delivery of the telegram for several days. If the had been delivered promptly, as might have be Perry could have left Sulphur Springs before 7 o' M. on November 6th, by rail, and arrived at Ano A. M. the next day. He would have gone to his r once. He did go on November 13th, when h received the telegram.

Plaintiff had resided at Anona only a short t desired to bury her husband at their old home, n som Prairie, in Lamar county. She desired her s with her, for the advice and consolation his presen afford her, and to arrange and superintend the bu aid her in moving the corpse ; but failing to hear f she kept the body until late in the evening of N 7th, when she was compelled to bury it about darl day at Anona.

There are two questions presented : Was there age or injury for which the law would compens Nations ? If so, was there anything in the messag cate her desire to have her son with her, or that a was to be taken by him ? Appellant violated its

with Mrs. Nations, promptly to send and deliver the telegram to S. H. Perry with all reasonable dispatch ; and, for a breach of the contract, she was entitled to recover the sum paid to appellee for the transmission of the message and injury to feelings as actual damage, if the facts should show that such injury was occasioned as the law would allow compensation for, and that the damage was reasonably within the contemplation of the parties when the contract was made. We can not doubt that the grief of Mrs. Nations at the death of her husband was attended with disappointment and anguish at the failure of her son to arrive and be present with her, with consolation and advice and direction in the burial of her deceased husband. This additional source of grief was from an independent cause, and was a proximate result from the breach of its contract by the defendant. It can not be said, as in *Rowell v. Telegraph Co.*, 75 Tex. 26, that the bitter disappointment of Mrs. Nations at the absence of her son was a mere continuation of the grief over the death of her husband. From the language of the telegram itself, to say nothing of the testimony of the witness Joseph Nations, that he told the operator that his father was dead, and that it was important that the telegram be rushed through at once, the defendant was bound to know that the mother was informing her son that her husband was dead. It was unnecessary that the telegram should contain, in its terms, an invitation to the son to come and be with her ; for such was the reasonable interpretation to put upon it. It was information from the grief-stricken mother to her son that his step-father (her husband) was dead ; and it could be hardly presumed that an express invitation would be needed for him to come.

The case of *Reese v. Western Union Telegraph Company*, decided by the Supreme Court of Indiana (24 N. E. Rep. 164), is upon very similar facts, and is very much in point ; the only difference being that it is not so strong a case upon the facts as this case. In that case the telegram was : "My wife is very ill ; not expected to

live." It was signed Wm. Reese, and addressed Clements, who was his brother-in-law. The court said: "It is true there was nothing in the telegram to the kinship that existed between the appellant and son to whom the message was addressed, nor did it the presence of Mr. Clements or his wife at the bedside of the dangerously sick sister-in-law; but this affords no excuse to the appellee for its failure to deliver the telegram." And again: "From the information before the court it entered into the undertaking, the appellee was bound to know that mental anguish might, and most probably would, come to some person, in case it failed promptly in transmitting and delivering the dispatch, and therefore such a result was contemplated when the telegram was delivered by the appellant to the appellee's agent at Jamestown, and is within the undertaking. Whether the mental suffering would be caused by the failure of the brother-in-law and wife to go at once to the bedside of the dying sister-in-law, or from the failure of a physician to reach his patient while there was still hope that some relief might be done to bring relief and possibly a restoration of health, or for some other cause, is unimportant."

In *Western Union Telegraph Co. v. Broesche*, 658 Tex. 658, the telegram was: "Mrs. Broesche is dead. Bring corpse on train to-night." It was sent for the use of the sender, and the court said it "was too obvious to require explanation."

The case of *Western Union Telegraph Co. v. Kirkpatrick*, 76 Tex. 217, has been cited by the appellant. In that case there was no mention of Mrs. Kirkpatrick, for the purpose of the suit was brought. The telegram was to the effect that the husband was to come and bring Ferdinand, who was a brother-in-law of Mrs. Kirkpatrick; that his father was very low. The court held that a suit could not be maintained for injury to feelings, as there was nothing in the telegram "to the company either that plaintiff had a wife, or that she was at Highland Station, or that the object of the telegram was to bring her to the bedside of the dying sister-in-law."

nication was to afford information upon which she was expected to act."

We think that in this case the appellant was in the possession of information sufficient to make it within the contemplation of the parties that the telegram was sent for the benefit of Mrs. Nations, and was, in effect, an invitation to her son to come to her. Joseph Nations told the agent that it was important, and that he wanted it rushed through at once. Why, except for the benefit of the sender? And could not the mother rely on her son to come without a command or an invitation to do so? To us it appears that the appellant was in possession of sufficient information to make it reasonably apparent that the telegram was sent for the benefit of Mrs. Nations, and that it was an invitation to her son to come, and be present with her.

Believing that the judgment of the court below should be affirmed, we so report.

Affirmed.

NOTE.—In addition to the foregoing seven cases, a large number of other telegraph cases were decided in Texas and reported during the period covered by this volume, which it has been found necessary to either omit or abridge. The latter course has been chosen, and a brief statement of each of these cases is here given. In most of them it will be observed that the question of damages was mainly discussed. Unless otherwise specified, the decision was of the Supreme Court.

J. H. Rowell v. W. U. Tel. Co., Nov. 5, 1889 (75 Tex. 26).

Mere continued anxiety caused by the failure of a telegraph company to deliver a message announcing the improved condition of a sick relative will not support a claim for damages. *Stuart v. W. U. Tel. Co.*, 2 Am. Elec. Cas. 771, distinguished.

Charles Elliott et al. v. W. U. Tel. Co., Nov. 5, 1889 (75 Texas 18).

A, the plaintiff, wanting to purchase a mill-saw, directed B, a merchant, to order one from St. Louis. B wrote a dispatch on white paper and handed it to C, a representative of the St. Louis firm to which it was addressed, to be transmitted, and gave him the money to pay for sending it. C went to the telegraph office, but instead of sending B's message, he wrote one, and delivered it for transmission. The telegraph agent was not, so far as appeared, notified that the telegram was for A's benefit or upon his business.

Held, that A had no cause of action against the telegraph company for failure to deliver the dispatch.

W. U. Tel. Co. v. Broesche, 2 Am. Elec. Cas. 815, distinguishes

W. U. Tel. Co. v. D. C. Feebles, Dec. 20, 1890 (75 Tex. 587).

If a mother would otherwise be entitled to recover damages from a telegraph company for delay of a telegram announcing the serious illness of her son, she would not be deprived of her remedy because of the fact that the relationship was not disclosed to the agent of the company if the message was presented for transmission.

W. U. Tel. Co. v. Edsall, 2 Am. Elec. Cas. 824, and *W. U. Tel. Co. v. Adams*, *ante*, page 768, followed.

W. U. Tel. Co. v. John T. Moore, Feb. 7, 1890 (76 Tex. 66.)

A message in the words "Billie is very low, come at once," is held to apprise the telegraph company to which it is presented for transmission that a near relationship probably existed between the person to whom the message was addressed and the addressee, and that mental distress would result from failure to deliver it promptly.

W. U. Tel. Co. v. Adams, and *W. U. Tel. Co. v. Feebles*, follow.

W. U. Tel. Co. v. Kirkpatrick, Feb. 14, 1890 (76 Tex. 217).

A husband cannot recover against a telegraph company for mental distress caused by delay of a telegram announcing the illness of his wife, when the telegram, which was addressed to the plaintiff, did not allude in any way to his wife, nor was any notice given to the agent at the transmitting station that the message referred to his wife's father; although the agent at the terminal station had such knowledge.

Adams, *Feebles* and *Moore* cases distinguished.

W. U. Tel. Co. v. Frank M. Smith, Feb. 18, 1890 (76 Tex. 253.)

Demurrer to petition, interposed upon ground that the damages claimed were too remote and conjectural, and not within the contemplation of the parties to the contract for transmission, held, improperly overruled.

W. U. Tel. Co. v. Kendzora, May 9, 1890 (77 Tex. 257).

A husband cannot recover for his wife's loss of services from a telegraph company for failure to deliver a telegram to a person calling him to attend the wife, in absence of proof that the ill wife, who died two days afterward, would have been saved but for the default.

W. U. Tel. Co. v. Godsey, Court of Appeals, June 4, 1890 (16 Tex. Rep. 789).

An allegation of gross negligence of a telegraph company in failing to transmit and deliver a telegram will not support a judgment for exemplary damages.

Telegraph Co. v. Nations.

W. U. Tel. Co. v. Andrews, Oct. 23, 1890 (73 Tex. 305).

Plaintiff, being summoned by telegraph on account of the death of his mother, sent a message in reply, announcing that he would arrive that night. The only train on which he could arrive was due at 10 P. M. The telegram reached the terminal office at 10 A. M., and was delivered at 4 P. M., before the burial of plaintiff's mother. She was, however, notwithstanding the message, buried before the plaintiff's train was due.

Held, that the action of the relatives in not awaiting plaintiff's arrival, was the proximate cause of his being denied the privilege of being present at the burial, and not the negligence of the telegraph company in delaying the delivery of the message.

W. U. Tel. Co. v. Lively, Court of Appeals, Jan. 14, 1891 (15 S. W. Rep. 197).

A telegraph company cannot, in case of its failure to deliver a message, be charged with special damages, not the natural and probable result of such default, unless it be alleged and proved that the company was apprised that such damages might result from failure to transmit and deliver the telegram.

Gulf, Colorado and Santa Fe Tel. Co. v. W. J. Richardson, Feb. 20, 1891 (79 Tex. 649).

A father is entitled to recover damages for his mental distress caused by delay of a telegraph company in the transmission of a message to a physician summoning him to attend a sick child.

Stuart v. W. U. Tel. Co., 2 Am. Elec. Cas. 771, and *W. U. Tel. Co. v. Henderson*, *ante*, page 570, cited with approval.

W. U. Tel. Co. v. Kelly Hoffman et al., March 24, 1891 (80 Tex. 420).

In an action by a father in his own behalf and that of his fifteen year old son for damages sustained by the negligent failure of a telegraph company to deliver a message nine days after it reached the terminal office, it appeared that the message was to summon a physician to attend the broken arm of the son; that the father took no steps to obtain another physician during the whole nine days; and as a result the boy's arm was ruined.

Held, that the father was guilty of contributory negligence which barred his recovery; but the verdict in favor of the boy was allowed to stand and the judgment upon it affirmed.

Gulf, C. & S. F. Railway Co. et al. v. P. J. Loontje, Nov. 24, 1891 (82 Tex. 323).

Plaintiff, a contractor, told the telegraph operator at the place where he was building a court house that he was going away to order material manufactured for the building; that the plans and specifications would be needed by the manufacturers; that he should telegraph for them, when needed, to his brother, whom he had left in charge of the work.

In an action for damages for failure of the company to deliver a telegram from the plaintiff to his brother, directing the plans and orders to be sent to him at Chicago,

Held, that the court properly instructed the jury that the plaintiff, if successful, would be entitled to recover (1) the price paid for transmission; (2) the value of his lost time; (3) the cost of the building material and above the price at which he could have bought them at the time the telegram should have been delivered.

That there was sufficient notice to the company of the importance of the dispatch to warrant evidence of special damages to the plaintiff.

But that the trial judge erred in refusing to instruct the jury upon the plaintiff's duty to use reasonable effort to lessen his damage by sending a second telegram for the plans when they failed to receive a response to the first.

Daniel v. W. U. Tel. Co., p. 650, followed as to measure of damages.

W. U. Tel. Co. v. Lydon, Nov. 27, 1891 (82 Tex. 384).

This was an action by a son for delay of a telegram by which he was prevented from reaching the bedside of his dying mother. The questions raised were as to the admission of the evidence. It was proper to admit (1) evidence that plaintiff was his mother's only child; (2) declarations of defendant's agents, to the sender, that the message had been delivered at the other end of the line; (3) evidence that plaintiff had sent another message to another person at the same time which was delivered, and a reply received within a given time.

Erie Tel. & Teleph. Co. v. Grimes, Nov. 8, 1891 (82 Tex. 69).

A charge to the jury in the following form was held to be proper in the case upon the question of the defendant's liability:

"If the agent who received the message for transmission knew the importance of its prompt transmission and delivery or could have known it from the terms of the telegram, or from other telegrams in reference to the same matter, the defendant would be chargeable with knowledge of the fact."

Potts v. W. U. Tel. Co., Dec. 15, 1891 (82 Tex. 545).

The telegram read: "Come at once. Mr. Potts is not expected to live." (Signed) M. E. Potts." *Held*, that this bore "unmistakable evidence of its importance, and if it did not directly indicate the relationship of the parties (that of husband and wife), it was amply sufficient to put the company upon inquiry in this particular."

"The other question, as to the right to recover for mental anguish, is an open question in this State."

W. U. Tel. Co. v. John B. Houghton, Dec. 15, 1891 (82 Tex. 561).

A telegram from a wife to her husband, the plaintiff, announcing the more serious condition of a sick child, was addressed to plaintiff.

tion throughout the country of all changes in the prices fixed upon. Accordingly, on the 13th of February, Hayes sent to the plaintiff, through the defendant, the following message :

" Price advanced to seventy dollars ; takes effect immediately."

This message was received at the office of the defendant in this city after midnight of that day, and was delivered to the plaintiff on the morning of the 14th. About 1 o'clock P. M. of the last mentioned day the plaintiff received through the defendant a second message from Hayes, dated the same day, which was in these words :

" Resolution advancing prices rescinded ; prices remain as before."

About midnight of the same day there was sent to the residence of Mr. Montague, the president of the paper company, in this city, from the office of the defendant, what purported to be a third message, from Hayes, the body of which was an exact duplicate of the first message above mentioned, and which therefore was in these words :

" Price advanced to seventy dollars ; takes effect immediately."

This message, although supposed to be an original message, was in fact a duplicate of the first, and was sent out from the defendant's office by mistake. One of the defendant's witnesses explains that it was ordered from Baltimore, the last relay office on the defendant's line between Toledo and this city, in order to supply a missing number from their message files in the office here, and that by mistake it was sent from the operating room to the business room, where it was sent out and delivered the night it was received.

The president of the paper company, however, supposing it to be an original message, and being aware that the Straw Board Association was in session, and that it was discussing the matter of prices, concluded that prices had been first advanced to \$70 per ton, then put back to the old

figures, and again advanced to \$70. Accordingly he the next day advanced the price on straw boards in this city to \$70, and afterwards refused several orders at the old price, which orders, had they been filled, as they would have been but for the delivery of the duplicate message, would have yielded the paper company in commissions \$567.39.

It was not until several days afterwards that the error was discovered. The first intimation the company had of it was through a communication from a North Carolina firm to whom the company had quoted the above-mentioned price. This communication, which is dated February 18, 1889, and addressed to the paper company, is in these words: "You advise us that straw boards have advanced to \$70, but you evidently neglected to inform us that this advance had been reconsidered and that prices remain as before. We were thoroughly posted on the advance and of the withdrawal of the advance at the time it was made."

Immediately upon the receipt of this communication the company telegraphed to General Manager Hayes for an explanation, who promptly replied that prices were the same as before. An explanation was then sought of the defendant, when, for the first time, it was discovered that message No. 3 was a duplicate, and that it had been sent out by mistake.

Soon afterwards the present action was instituted. The defendant pleaded the general issue, upon which plea issue was joined. After the evidence had been closed, the defendant demurred to the evidence, in which demurrer the plaintiff joined. The jury thereupon assessed the damages conditionally at \$600, and the court, overruling the demurrer, gave judgment for the plaintiff for \$600, with interest and costs, which is the judgment appealed from, and of which both parties complain.

* * * * *

The sole defense set up by the telegraph company, and relied upon here, is that the plaintiff was guilty of such contributory negligence as to defeat a recovery. A careful

Telegraph Co. v. Paper Co.

consideration of the case, however, leads us to the conclusion that this position is untenable.

According to the established definition, contributory negligence consists, in contemplation of law, in such acts or omissions on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent acts of the defendant, are a proximate cause of the injury complained of. Unless, therefore, the evidence in the present case shows such want of care on the part of the plaintiff, its right to recover is clear, for the defendant's negligence is conceded. Has the plaintiff, then, been guilty of omitting to use such care? Extraordinary care is not required. Therefore the question, stated differently, is: Has the plaintiff failed to exercise such a degree of care as an ordinarily prudent man might reasonably be expected to exercise under similar circumstances? The rule is sometimes stated to be that, if the negligence of the plaintiff contributed *in any degree* to cause the injury, there can be no recovery; but this statement is inaccurate and misleading. A more accurate statement is that not slight negligence, but *any want of ordinary care*, will defeat the action; and by this test the present case must be determined.

It is also to be observed in this connection that negligence is not an absolute, but a relative, term. Hence what will amount to proof of the charge is necessarily a question of fact, depending upon a great variety of circumstances which the law cannot define. *Carrington v. Ficklin's Ex'r.*, 32 Gratt. 879; *R. & D. R. R. Co. v. Medley*, 75 Va. 499. Each case must therefore be determined upon its own circumstances.

In the present case the principal points relied on to show contributory negligence are these, viz.: (1) That the message bore on its face evidence of being a duplicate; and (2) the delay of the plaintiff in calling upon the defendant for an explanation.

Omitting the formal printed part, the message, as delivered, was in this form:

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"Number	Sent by	Rec'd by	Check
120 B.	C. N.	O.	8 paid.

Feb. 14, 1892

Received at 1300 E. Main St., Richmond, Va. 6.56 P. M.

Dated, Toledo, O., 13.

To Virginia Paper Co., Richmond."

Then follows what has already been quoted.

In the argument here the duplicate itself was exhibited for the inspection of the court, from which it appears that the three letters "Dup." were written in ink just above the first-mentioned date, and also across the printed form, near the top of the paper. These letters are an abbreviation used in telegraphy for the word "duplicate." No order for a duplicate, however, had been given by the plaintiff, and there is nothing to show that a duplicate message had ever before been sent out by the defendant to the plaintiff, or that the officers or agents of the plaintiff knew the meaning of the abbreviation. The secretary of the plaintiff, Mr. Meredith Montague, testifies he thought they were telegraphic "hieroglyphics," and paid no attention to them. And, although the messages were exhibited a day or two afterwards by Montague to Major Norman Randolph, a large and successful manufacturer of paper boxes in this city, and a customer of the plaintiff, the fact that one was a duplicate never occurred to either of these gentlemen, although they probably examined them several times.

Randolph testifies that, in response to an order from him to the plaintiff for straw boards, Montague called upon him at his place of business, taking with him the three telegrams, which they read together. "I receive a great many telegrams," he says, "and certainly never would have discovered that the one in question was a duplicate. It would have been to my advantage," he added, "to have discovered it, because, if I could have bought of the plaintiff at the old price, instead of having to place my orders elsewhere, I would have saved \$50 or \$75 in freight paid on

boards purchased at a distance, from parties who were not members of the Straw Board Association, and bound by its prices."

It is contended, however, for the defendant that the words and figures, "Dated, Toledo, O., 13," on the face of the message, were sufficient to show to any man of ordinary intelligence and prudence that the message was dated the *15th of February*, or the day before the second message, which announced that the resolution advancing prices had been rescinded.

Whether or not, under ordinary circumstances, this would be sufficient evidence of that fact, it is unnecessary to inquire. We do not think it so in the present case, because here the circumstances are peculiar. The officers of the paper company knew the association was in session, and that it was discussing with warmth the subject of prices. They also knew from previous dispatches that its action had been vacillating. The first dispatch informed them that prices had been advanced; the second, received only a few hours afterwards, that the old prices had been restored. So that a subsequent announcement, which implied that prices had been again advanced, was not calculated to excite surprise, or to suggest inquiry, or even close scrutiny, any more than the announcement contained in either of the former messages.

The plaintiff, moreover, had no reason to anticipate negligence on the part of the defendant. On the contrary, the natural presumption was that the defendant had acted with due care. The nature of the business of a telegraph company requires it to act with such care, and it holds itself out accordingly. Most important privileges and franchises are conferred upon such companies by the State, and the confidence of the public which they invite, and which is generally reposed in them, is a source of no small remuneration to them.

The defendant, therefore, in sending out the message in question, tacitly, at least, represented it to be an original dispatch, and that it had been duly and correctly trans-

mitted; and upon that representation the plaintiff relied. And why should it not have relied upon it? To whose mind would it probably have occurred that the defendant had taken the pains to deliver, at midnight, a *duplicate* of a message received the day before? We think, in view of all the circumstances, the case comes fairly within the principle that, where the defendant by his own negligent act has thrown the plaintiff off his guard, and given him good reason to believe that vigilance is not needed, he ought not to be heard to say that the plaintiff's lack of vigilance contributes to the injury. Beach Cont. Neg., sec. 23; 1 Shear. & R. Neg., sec. 91. At all events, if the plaintiff has been guilty of negligence at all, it is slight negligence only, not amounting to a want of ordinary care; and that, as we have seen, is not sufficient to defeat the action.

The judgment is affirmed.

Judgment affirmed.

NOTE.—The only earlier Virginia telegraph case in this series is *W. U. Tel. Co. v. Reynolds*, vol. 1, p. 487.

CHASE V. WESTERN UNION TELEGRAPH CO.

U. S. Circuit Court, N. D. Georgia, Dec. 23, 1890.

(44 Fed. R. 534.)

DELAY IN TELEGRAM.—RECEIVER OR ADDRESSEE.—MENTAL SUFFERING.

(Head-note by the court):

The receiver of a telegraphic message, the delivery of which has been negligently delayed, cannot recover for mental suffering alone, unaccompanied by other injury.

Cases of this series cited in opinion: *So Relle v. W. U. Tel. Co.*, vol. 1, p. 848; *Gulf, &c. Co. v. I. Levy*, vol. 1, p. 586; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 786; *Russell v. W. U. Tel. Co.*, vol. 1, p. 653; *Gulf, &c. Co. v. J. T. Levy*, vol. 1, p. 543; *West v. W. U. Tel. Co.*, vol. 2, p. 582; *Thompson v. W. U. Tel. Co.*, *ante*, p. 750.

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AT law. On demurrer to declaration.

Blackburn & Garrett, for plaintiff.

Bigby & Berry, for defendant.

NEWMAN, J.: The plaintiff avers that by gross negligence the defendant delayed the delivery of a telegraphic message to him, whereby he was prevented from reaching the death bed of a brother-in-law, and by reason of which he reached the point where the relation died several hours after death; his sister, in the mean time, being compelled to appeal to strangers for assistance, on account of which he was caused serious inconvenience, great mortification and mental suffering. He claims punitive and vindictive damages in the amount of \$5,000. To this declaration a general demurrer is filed. Can a recovery be had for mental suffering and anguish alone, unmixed with other injury? is the question presented by this demurrer. The negligence of the defendant is sufficiently averred; and it seems to be settled in this country—contrary, however, to the English cases—that the receiver of a telegram may recover damages actually sustained by negligent delay in delivery. An examination of the adjudged cases, however, shows that the great weight of authority is against recovery in a case like this for mental suffering alone.

In the case of *So Relle v. Telegraph Co.*, 55 Tex. 308, it was held that "a telegraph company is liable for an injury to the feelings of a son by the wilful neglect to deliver to him a message announcing the death of his mother, whereby he was prevented from attending her funeral." But in the subsequent case of *Railway Co. v. Levy*, 59 Tex. 563, this opinion was overruled, and the court held as follows: "The plaintiff sued a telegraph company for delay in delivering to him a message announcing the death of his son's wife and child, whereby he was prevented from attending the funeral. Held, that there could be no recovery for his mental suffering." The case of *So Relle v. Telegraph Co.*,

supra, was referred to, and the court say "that it cannot be sustained upon principle, nor upon the authority of adjudicated cases." There are later cases in Texas upon this subject, but I understand them to be in harmony with the case last cited.

In the case of *Wadsworth v. Telegraph Co.*, 86 Tenn. 695 (8 S. W. Rep. 574), this question was considered, and the majority of the court held that damages for mental suffering may be recovered. LURTON, J., with whom FOLKES, J., concurred, dissented, saying "that an action for injury to the feelings, or fright or grief, or other mental injury, cannot be sustained as an independent ground of action." It appears that there are statutes in Tennessee requiring telegraph companies to deliver telegraphic messages "correctly, and without unreasonable delay;" and for a failure to do so the defaulting company is declared to be "liable in damages to the party aggrieved." CALDWELL, J., who delivered the opinion of the court, lays some stress on this statute, and TURNER, C. J., in a concurring opinion, rests his concurrence primarily upon this statute; holding that it covers all messages, and makes no distinction as to the character of messages. So that in this case a bare majority sustained the right of action for damages of this sort, and the right rested largely upon the statutes of the State.

I have found no other case that goes to this extent, nor has any such case been cited. On the contrary, quite an array of authorities deny the right to recover for damages of this character. *Russell v. Telegraph Co.* (Dak.), 19 N. W. Rep. 408; *West v. Telegraph Co.*, 39 Kan. 93 (17 Pac. Rep. 807); *Railway Co. v. Levy*, 59 Tex. 542, 563; *Wyman v. Leavitt*, 71 Me. 227; *Johnson v. Wells*, 6 Nev. 224; *Nagel v. Railway Co.*, 75 Mo. 653; *Railway Co. v. Stables*, 62 Ill. 313; *Freese v. Tripp*, 70 Ill. 503; *Meidel v. Anthis*, 71 Ill. 241; *Joch v. Dankwardt*, 85 Ill. 333; *Porter v. Railway Co.*, 71 Mo. 83; *Fenelon v. Butts*, 53 Wis. 344 (10 N. W. Rep. 501); *Ferguson v. Davis Co.*, 57 Iowa, 601 (10 N. W. Rep. 906); *Stewart v. Ripon*, 38 Wis. 584; *Mas-*

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ters v. Warren, 27 Conn. 298; *Blake v. Railway Co.*, 10 Eng. Law & Eq. 442; *Lynch v. Knight*, 9 H. L. Cas. 577; *Burke v. Railway Co.*, 10 Cent. Law J. 48; *Rowell v. Telegraph Co.* (Tex.), 12 S. W. Rep. 534; *Thompson v. Telegraph Co.* (N. C.), 11 S. E. Rep. 269 (30 Amer. & Eng. Corp. Cas. 634).

The telegram in this case was sent from one point in Georgia to another. Section 2943 of the Code of Georgia is as follows: "Exemplary damages can never be allowed in cases arising on contract." The plaintiff sues for punitive and vindictive damages only. I do not understand that this character of damages can be recovered, except for an actual tort. Any right of the plaintiff in this case would be for breach of an implied contract to promptly deliver the telegram, and it seems that vindictive or punitive damages would never be given in a case of this kind. The demurrer to the declaration in this case must be sustained.

NOTE.—For earlier cases decided by Federal courts, see note to *Cahn v. W. U. Tel. Co.*, *post*.

This case is cited in the next following.

CRAWSON V. WESTERN UNION TEL. CO.

U. S. Circuit Court, W. D., Arkansas, October 7, 1891.

(47 Fed. Rep. 544.)

RIGHTS OF ADDRESSEE.—MENTAL SUFFERING.

(Head-note by the court):

The party receiving a telegraphic message, the delivery of the same having been negligently delayed by the agents of the company, cannot recover for mental suffering alone, when unaccompanied with other injuries. To warrant the consideration of mental suffering as an element of damages, there must be such gross negligence on the part of the agents of the company as to indicate a wanton or malicious purpose in failing

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to transmit and deliver the message. To warrant the consideration of mental suffering in fixing the amount of damages, the mental suffering must be an element of physical pain, or the natural and proximate result of some physical injury.

Cases of this series cited in opinion: *Reese v. W. U. Tel. Co.*, ante, p. 640; *W. U. Tel. Co. v. Henderson*, ante, p. 570; *Chapman v. W. U. Tel. Co.*, ante, p. 670; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 786; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 848; *Railroad Co. v. I. Levy*, vol. 1, p. 586; *Railroad Co. v. J. T. Levy*, vol. 1, p. 548; *Chase v. W. U. Tel. Co.*, ante, p. 817.

AT law.

F. E. Willey, for plaintiff.

Clendenning, Mechem and Youmans, for defendant.

PARKER, J.: The plaintiff, as the receiver of a telegraphic message, brings suit for the recovery of damages, and he alleges in his complaint that he lives in the corporate limits of the town of Van Buren, within three-quarters of a mile of the office of defendant. The defendant is doing a general telegraph business in this State, such as receiving, transmitting and delivering telegrams from and to public and private persons for pay. The said company has an office in Van Buren; also at Salisaw, in the Cherokee Nation, Indian country. That on the 20th of April, 1891, one H. O. Meadows employed and paid the defendant to send a telegram of the following import:

“April 20, 1891. Salisaw, I. T.

To Robert Crawson, Van Buren: Come on this evening's train. Ma wants to see you.
H. O. M.”

to the plaintiff, at Van Buren, Ark. That the same was for the benefit of plaintiff. That defendant received pay for transmitting said telegram. That the defendant refused to deliver the said message to the plaintiff without any good or lawful excuse whatever, and to the injury and mental suffering of plaintiff. The defendant refused and failed to deliver said telegram in proper time, because of wilful

carelessness, wrong, and refusal. That the plaintiff's mother-in-law was at Salisaw, very sick, and supposed to be dying. That she, wanting her children near her at the time of her death, had the dispatch sent to the plaintiff. By reason of the defendant's failure to deliver the dispatch to plaintiff, he was prevented, for the space of 24 hours, from going to the bedside of his mother-in-law, and for that reason was compelled to undergo and suffer disappointment, and great anguish and uneasiness of mind. That defendant's agent knew plaintiff's place of abode, and there was ample time to deliver him the dispatch, so he could go on the next train to Salisaw, but defendant's agent failed to do so.

Damages, if actual, must flow directly and naturally from the breach of contract, and they must be certain, both in their nature, and in respect to the cause from which they proceed. 3 *Suth. Dam.* 303. The nature of the damages, and the cause from which they proceed, must be alleged with certainty in the complaint. Under this rule, the only cause from which damages can proceed in this action is mental suffering, because this is the only source of damages that is set out with sufficient certainty. True, in one part of the complaint it is alleged that the defendant's failure was to the great injury and mental suffering of plaintiff; yet the pleader alleges no specific fact which shows an injury aside from his mental suffering. Then the only question for the court is, can the plaintiff recover for mental suffering alone, unaccompanied with other injury? The rule as stated in *Wood's Mayne, Dam.* 74 (1st Amer. ed.) is: "In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground for action." I think the Supreme Court of Mississippi in *W. U. Tel. Co. v. Rogers*, 9 *South. Rep.* (opinion delivered May 25th, 1891, by Mr. Justice COOPER), asserts the correct rule when it says:

"We are unwilling to depart from the long established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected

from physical injury, and not the result of the wilful wrong of the defendant; that such damages are recoverable in actions for breach of contract of marriage."

A rule different from the above, and holding that damages may be recovered for mental suffering, unaccompanied with other injuries, by the receiver of a telegraph message for a negligent delay in delivering the same by a telegraph company, has been declared as the correct rule by the Supreme Courts of Indiana, Alabama, Kentucky, Tennessee and Texas. *Reese v. Telegraph Co.*, 125 Ind. 295 (24 N. E. Rep. 163); *Telegraph Co. v. Henderson*, 89 Ala. 510 (7 South. Rep. 419); *Chapman v. Telegraph Co.* (Kentucky Supreme Court, June, 1890), 13 S. W. Rep. 880; *Wadsworth v. Telegraph Co.*, 86 Tenn. 695 (8 S. W. Rep. 574); *So Relle v. Telegraph Co.*, 55 Tex. 309. The Supreme Court of Mississippi, in *W. U. Tel. Co. v. Rogers*, *supra*, declares: "These cases rest upon the authority of each other, finding no support in the decisions of other States or of England." It may be observed that the cases on the subject of the recovery of damages for injury to feelings because of wilful neglect of a company to deliver a telegraphic message are not uniform in the State of Texas. The case of *Railroad Co. v. Levy*, 59 Tex. 542, in effect overrules *So Relle v. Telegraph Co.*, *supra*. But it may be remarked the United States Circuit Court for the western district of Texas, in *Beasley v. Telegraph Co.*, 39 Fed. Rep. 181, follows the case of *So Relle v. Telegraph Co.* I think the true rule is announced in *Chase v. Telegraph Co.*, decided by the Circuit Court for the northern district of Georgia (44 Fed. Rep. 554), as well as in the numerous relevant authorities there cited. The principle there announced is in accordance with the old rule of damages, recognized by the courts of this country and England, and it is that the receiver of a telegraphic message, the delivery of which has been negligently delayed, cannot recover for mental suffering alone, unaccompanied with other injuries. If there is such gross negligence on the part of the agents of the company as to indicate wantonness or malicious

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purpose in failing to transmit or deliver the message, there might be a recovery for mental suffering alone, or mental suffering may be taken into consideration when it can be considered as the natural and proximate result of a physical injury. It, in such a case, becomes an element to be considered in connection with the physical pain. There is nothing more alleged in the complaint in this case than ordinary wilful negligence. There are no allegations of a wanton or malicious purpose on the part of the agents of the defendant in not delivering the dispatch. Such being the case, under the rule named above, and upon the allegations of the complaint, the demurrer must be sustained.

NOTE.—See INDEX to this and to preceding volumes, titles "Receiver or Addressee," "Damages."

See note to next case.

E. CAHN V. WESTERN UNION TELEGRAPH CO.

U. S. Circuit Court of Appeals, Fifth Circuit, December 7, 1891.

(48 Fed. R. 810.)

DELAY OF TELEGRAM.—DAMAGES.

The loss of contemplated profits on a sale of stock, which by a delayed telegram the sender ordered his brokers to sell, when in fact they had no such stock belonging to him, and there was no order to buy, is too remote and speculative to form a basis of recovery against the telegraph company for damages caused by the delay in transmission.

Case of this series cited in opinion: *W. U. Tel. Co. v. Hall*, vol. 2, p. 868.

ERROR to the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi.

Action to recover damages caused by delay in delivering

a telegraphic message. Judgment directed for plaintiff nominal damages. Plaintiff brings error.

E. H. Bristow, for plaintiff in error.

T. L. Bayne, Geo. Denegre, and Y. L. Bayne, defendant in error.

Before PARDEE, Circuit Judge, and LOCKE and District Judges.

BRUCE, J. : This is a suit brought in the court by the plaintiff, who is appellant here, against the defendant telegraph company, appellee, for damages for a breach of contract and duty on the part of defendant failing to deliver in due time a telegraphic message to plaintiff to his brokers, Latham, Alexander & Co., New York city. The message was in these words :

"COLUMBUS, Miss., Feb. 20

To Messrs. Latham, Alexander & Co., New York, N. Y. : Send me
Tennessee Coal and Iron. [Signed], E

Plaintiff avers in his complaint :

"That said message was delivered to and received by the agent or operator of the defendant at its office in Columbus, Miss., on or about 7 o'clock P. M. on Thursday, 20th day of February, 1890; * * * that, after that time, an early, rapid and heavy decline in the value of the stock of the Tennessee Coal and Iron Company began, with a view of purchasing later on the same day a large number of shares when the price and value thereof had reached a much lower figure, thereby realizing the difference between the market value thereof at the time of sale and receipt, and knowing that Latham, Alexander & Co. had sold the stock, and would sell the same on his account, to get themselves out of the money of plaintiff in their purchase, and would, at the option of the receiver or purchaser, deliver, before a quarter past two o'clock on said

said stock certificate and power irrevocable in the name of witness, or guaranteed by a member of the New York Stock Exchange, or a friend represented at the exchange, residing or doing business in New York, or by transfer of said stock as provided by the constitution and rules of the New York Stock Exchange, plaintiff delivered said message to the defendant, to be transmitted to New York, to be delivered to the said Latham, Alexander & Co.; that, if said message had been transmitted and delivered in due time, the said brokers would have made the sale on the 21st day of February, at \$73 per share."

But plaintiff avers:

"That said message was not promptly transmitted and delivered as agreed, but by the gross negligence of defendant's servants and operatives in charge of the same it was delayed, and not delivered until the 28th day of February, 1890, when said stock had fallen in price to, and was selling in the market at, \$55 per share, thus taking several times longer for its transmission and delivery than it required in due course of mail from Columbus, Miss., to New York city; and that the cause of the delay and non-delivery of said message, plaintiff avers, was negligence of the defendant's operators and servants. * * * Wherefore the plaintiff sues and demands judgment for \$3,451.66, and costs."

To this declaration there are several pleas: (1) The general issue, not guilty. (2) That the message mentioned in the declaration was a night message; and that the plaintiff failed to present claim for damages to the defendant company within thirty days, as required by the regulations of the company. (3) Defendant sets up contract with plaintiff that no claim for damages should be valid unless made within thirty days after the message was sent, and that the plaintiff failed to present his said claim. (4) Defendant sets up contract that sender of message should not claim damages beyond a sum equal to ten times the amount paid for the transmission of the message, and pays into court the sum of five dollars, amount of its alleged liability. (5)

That said defendant denies that said plaintiff had in the possession of said Latham, Alexander & Co., or in the possession of any one else, subject to their control, 200 shares of the stock of the Tennessee Coal & Iron Company, at the time of the sending of said message; and avers the fact to be that it was the intention of the plaintiff that said brokers, Messrs. Latham, Alexander & Co., should pretend to sell the amount of stock so named in the telegram to be delivered or subject to delivery on the 21st day of February, 1890; but the real intent of all the parties to said transaction was to speculate on the rise or fall of said stock, without any intention of selling or delivering the same, but, when called for, to settle the difference between the contract price and the market price on the day when called for, that is to say, a settlement on margins. Wherefore said defendant says that said transaction was illegal and void, and this it is ready to verify. Replications are filed to second and third pleas; issue joined in fifth plea; issue, in short, by consent or replication to the third plea. The case came on for trial before a jury on the issues presented on the pleadings, and, after hearing the testimony, plaintiff filed his motion for a peremptory instruction to the jury charging them that they shall find a verdict for the plaintiff for the sum to which he is entitled on the facts in testimony, which motion, after argument by counsel pro and con, was by the court overruled and refused, to which plaintiff then and there excepted; whereupon the defendant filed its motion for a peremptory instruction to the jury charging them that they shall find a verdict only for the amount of the telegram on the facts in testimony, and, after argument, the court gave the instruction found in the record. The charge is in effect, "that the plaintiff cannot recover; the claim for damages is too remote, uncertain and speculative, and will not be allowed by you in your verdict." To the giving of the charge the plaintiff excepted. The verdict of the jury was for thirty-two cents and three-fourths of a mill, to which the plaintiff excepted, and ten-

ders his bill of exceptions, embodying all the testimony and the rulings and order of the court.

The assignment of errors, as far as necessary to be here stated, are: The court erred in giving the instruction to the jury as to the measure of damages in the cause. The Circuit Court erred in refusing to give the special instruction asked by plaintiff. The question then is, did the court err in instructing the jury on the trial of the cause that the claim made by the plaintiff for damages is too remote and speculative to be allowed by the jury in its verdict? A number of cases are cited by the counsel for appellee to sustain the ruling of the court, among which is the case of *Telegraph Co. v. Hall*, 124 U. S. 444 (8 Sup. Ct. Rep. 577). In that case the message was to buy, and not to sell, as in the case at bar. It was dated December 9, 1882, and should have reached the sendee at Oil City, Pa., at 11.30 A. M. that day, but the message was not delivered until the exchange had closed for the day, so that Hall could not purchase the petroleum ordered by the plaintiff; and that, at the opening of the board the next day, the price had advanced from \$1.70 per barrel, the price on the previous day, to \$2.25 per barrel, at which Hall did not deem it advisable to make the purchase, and did not do so. The message was: "Buy ten thousand, if you think it safe." The court held there could be no recovery, because, in point of fact, the plaintiff had suffered no actual loss, and the court say, at page 454, 124 U. S., and page 580, 8 Sup. Ct. Rep. :

"It is clear that, in point of fact, the plaintiff had not suffered any actual loss. No transaction was in fact made, and, there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th and of making a profit by selling on the 10th; the sale on that day being purely contingent, without anything in the case

to show that it was even probable or intended, much less that it would have certainly taken place."

The case at bar is the counterpart of the case cited. The order was to sell two hundred shares of stock, but by the fault of the telegraph company this order was not delivered to appellant's brokers in New York, as it should have been, on the morning of the 21st, and not until the 28th; and there was no sale of the stock on the 21st, or on any subsequent day. And it may be said here, as it was there, "all that can be said to have been lost was the opportunity to sell" at a higher price on the 21st and buy at a lower price afterwards. The claim in the case at bar goes much beyond any rule of damages in any of the cases cited. It is not for the difference in the price of the stock between what it was on the 21st, when the order to sell should have been received by the brokers in New York, and what plaintiff actually sold for on a repeated order and no sale on any subsequent day, not even the 28th, when the order was received, but not acted upon, by the plaintiff's brokers. In the case cited, which seems to be quite elaborate, the court at page 455, 124 U. S., and page 580, 8 Sup. Ct. Rep., goes on to say:

"It is well settled, since the decision of *Masterson v. Mayor, etc.*, 7 Hill, 61, that a plaintiff may rightfully recover the loss of profit as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfilment. In the language of the Supreme Judicial Court of Massachusetts, in *Fox v. Harding*, 7 Cush. 516: "These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into; but if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the

damages occasioned by the breach of the contract in the suit."

Counsel make a somewhat vigorous attack on the soundness of the decision in the case of *Telegraph Co. v. Hall*, and say it will never be applied beyond the facts in that particular case. However that may be, we find it cited by the Supreme Court of the United States approvingly in the case of *Howard v. Manufacturing Co.*, 139 U. S. 205 (11 Sup. Ct. Rep. 500), where it was held :

"That in an action to recover the contract price for putting up mill machinery, anticipated profits of the defendant, resulting from grinding wheat into flour and selling same had the mill been completed at the date specified in the contract, cannot be recovered by way of damages for the delay in putting it in."

And in that case, Justice LAMAR, speaking for the court, at page 206, 139 U. S., and page 303, 11 Sup. Ct. Rep., says :

"The grounds upon which the general rule of excluding profits in estimating damages rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages ; (2) because such line of profits is ordinarily remote, and not, as a matter of course, a direct and immediate result of non-fulfilment of the contract ; (3) and because most frequently the engagement to pay such line of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms." Citing *Telegraph Co. v. Hall*, and other authorities.

We think the case at bar falls within the principle of the case of *Telegraph Co. v. Hall*, and much authority is cited in line with that decision, so that we do not see why that should not be taken as settled law ; at least the case is binding upon us.

Again, the plaintiff ordered the sale of 200 shares of Tennessee Coal & Iron Stock, not his stock, which he held

or owned, for he does not claim to have held or owned any such stock at the time of this transaction ; but it is said his brokers, Latham, Alexander & Co., had the stock,—not even that they had it and owned it, but as the witnesses Latham and Alexander both say, in answer to interrogatory 15, (and it may be noticed in passing that the answers of these two witnesses to this interrogatory, and to most of the other interrogatories, are in the same identical words, and notable for the statement of conclusions rather than facts):

“If Latham, Alexander & Co. had received the said telegram of E. Cahn when it should have been delivered, they would have executed the order within contained, and sold for him 200 shares of stock of the Tennessee Coal & Iron Co., and would have supplied stock in their possession for delivery on account of the sale, according to the custom of the New York Stock Exchange, if said Cahn did not own the stock.”

There is at least some obscurity in the meaning of this answer, and the constitution and rules of the New York Stock Exchange are not in the record, and we have not the opportunity of referring to them; the fact is, however, conceded that Cahn did not hold or own the stock in question at the time of the order to sell on February 21st, nor did he have money in the hands of his brokers at the time to purchase the stock. Latham and Alexander again both testified, in answer to the same question, in the same words :

“Latham, Alexander & Co., on the 21st of February, 1890, did not hold for E. Cahn any stock of the Tennessee Coal & Iron Co. Latham, Alexander & Co. did not hold for E. Cahn any money on deposit with which to buy or sell stock, but they did hold for him securities sufficient to warrant them in making the sale of said stock as directed had the message been received on the morning of February 21, 1890.”

Appellant could doubtless have gone into the market and bought the stock for present or future delivery, could have authorized his brokers to do it for him, or they could supply

it themselves, as they testify they would have done had they received the order ; and, if so, and Cahn had paid or become liable for the market price of the stock, that day, there would have been no profit to him in the transaction, and therefore no damage. If, by supplying the stock Latham and Alexander mean that their firm would have loaned it to him, then his case is that, by the alleged negligence of the defendant company, he was prevented from borrowing 200 shares of Tennessee Coal & Iron stock, and selling it on the 21st of February at its market price on that day, and buying the same number of like shares of stock on the 28th, or a subsequent day, when the market price had fallen ; and so suffered the loss of profits he would have made if he had borrowed, sold, bought back and returned the stock to his brokers. Manifestly, in such a transaction, or, rather, want of transaction, the alleged damages are too uncertain, remote and contingent to constitute a proper basis for a recovery.

It is insisted that an order, and delivery to an agent of a telegraphic company for transmission, to sell shares of stock, under the circumstances of the transaction in question, implies and means an order to buy "cover," as it is called ; and that such will be held to have been within the knowledge and contemplation of the parties, the plaintiff (appellant) and the appellee (telegraph company). Telegraphic companies transmit and deliver messages, for hire, touching business or other relations of the persons who employ them. It is not like contracts between persons for the building of structures, erecting machinery, or even for the delivery of goods, in all of which classes of cases much depends upon what may be considered to have been fairly and justly within the contemplation of the parties when the contract was made ; and it may be questioned whether an order to sell 200 shares of a given stock delivered to a telegraph operator for transmission over his line would imply knowledge on his part that an order to purchase the same number of shares of same stock would surely follow. It is said that Scott, the telegraph operator at Columbus, Miss.,

was informed and well knew the purpose and object of the message, but he says in his deposition :

"I understood it was an order to Messrs. Latham, Alexander & Co. to sell 200 shares of Tennessee Coal & Iron — just what appears on the face of the message."

But, even if he (Scott) was familiar with transactions of this character made in the stock exchange in New York, his company could hardly be held responsible on account of such knowledge possessed by one of its employees. But, even if it could be conceded that an order to sell implied an order to buy, the question remains uncertain as to when such an order to buy would be given for execution. That would, in the nature of things, depend upon the market, and upon the buyer's judgment of the market. Again, the legal, if not the only, presumption would be that Cahn was ordering the sale of his own stock, and not that he contemplated the sale of something he neither had nor proposed to acquire, with no intention that in the sale ordered an actual delivery of the stock was to be made, for such presumption would involve a violation of the law as it had been held in some of the highest courts in the country. In any view of the case, we perceive no error in the charge to the jury in the court below, and the judgment is affirmed ; and it is so ordered.

Note.—For telegraph cases decided in Federal courts, earlier than the three preceding, see note, vol. 2, p. 875.

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THE PEOPLE, EX REL. WILLIAM KEMMLER, Appellant, v.
CHARLES F. DURSTON, AGENT AND WARDEN OF AUBURN
PRISON, Respondent.

New York Court of Appeals, March 12, 1890.

(119 N. Y. 569.)

ELECTROCUTION.—CONSTITUTIONAL LAW.

The provision of the Constitution of the State of New York, viz., "Nor shall cruel and unusual punishments be inflicted" (art. 1, sec. 5), confers power upon the court to declare void legislative acts prescribing punishments for crime, which are in fact cruel and unusual.

The unconstitutionality of a law must be shown by the language of the law itself or by matters of which a court can take judicial notice. Extraneous proof cannot be used to condemn it.

It does not appear upon its face that section 505 of the Code of Criminal Procedure, as amended by laws 1888, chap. 489, which enacts that "the punishment by death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead," is in conflict with the above named constitutional provision.

While the decision by the Legislature of the question of fact, whether or not the use of electricity as an agency for producing death involves cruelty within the meaning of the constitutional provision, is binding upon the courts; and therefore the testimony taken by the court in a given case was not available to impeach the validity of the legislation; yet it contained a valuable collection of facts, available as argument, and quite conclusive that electrocution results in instantaneous and painless death.

APPEAL from order of General Term of the Supreme Court, Fifth Judicial Department, which affirmed an order of the county judge of Cayuga county, dismissing a writ of habeas corpus.

Facts stated in opinion.

W. Burke Cochran, for appellant.

Charles F. Tabor, attorney-general, for respondent.

O'BRIEN, J.: The respondent is the agent and warden of the State prison at Auburn, and the relator, being in his custody, applied for a writ of habeas corpus to inquire into the cause of detention, which was made returnable by the officer granting it before the county judge of Cayuga county. The relator, in his petition for the writ, stated that the cause or pretense of the imprisonment complained of was that after his indictment and trial for the crime of murder in the first degree, and his conviction thereof in the Court of Oyer and Terminer, he was sentenced by that court to undergo a cruel and unusual punishment for that crime, contrary to the Constitution of this State and of the United States, and was threatened with deprivation of life without due process of law, by reason of such illegal sentence and judgment of the court. The writ was duly served upon the respondent, who made return thereto that he detained the relator in his custody as agent and warden of the prison by virtue of the judgment of the Court of Oyer and Terminer held in the county of Erie, whereby the relator was duly convicted of the crime of murder in the first degree, and also by virtue of a warrant duly delivered to him under the hand and seal of a justice of the Supreme Court presiding at the said Court of Oyer and Terminer where the relator was convicted, which recited the indictment, trial, conviction and sentence of the relator, and directed the respondent to carry the same into effect in these words:

Now, therefore, you are hereby ordered, commanded and required to execute said sentence, upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State prison, or within the yard or inclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient inten-

sity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead.

This command and direction to the warden was in accordance with the sentence actually passed upon the relator after conviction, in these words :

The sentence of the court is that within a week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State prison, or within the yard or inclosure adjoining thereto, the defendant suffer the punishment of death to be inflicted by the application of electricity, as provided by the Code of Criminal Procedure of the State of New York, and that in the meantime the defendant be removed to, and until the infliction of such punishment be kept in solitary confinement in, said Auburn State prison.

On the return day of the writ the relator and the respondent appeared by counsel before the county judge, and by agreement of counsel the production of the relator, pursuant to the command of the writ, was waived. Counsel for the relator then offered to prove that the infliction of the penalty named in the sentence, namely, death by the application of electricity, is a cruel and unusual punishment within the meaning of the Constitution, and cannot, therefore, be lawfully inflicted. The attorney-general objected, on the ground that the court had no authority to take proof in regard to the constitutionality of the statute. This objection was overruled by the county judge, and the counsel for the respective parties agreed that a referee be appointed for the purpose of taking the testimony in pursuance of the offer.

In this way a mass of testimony was given upon both sides, certified by the referee to the county judge and embraced in the extended record before us. The result was that after a hearing upon the report of the referee the county judge dismissed the writ and remanded the relator to the custody of the respondent. When it appeared, from the return of the respondent, that he retained the relator in custody under and by virtue of the judgment of a court of

competent jurisdiction wherein the relator was convicted of murder, it was the duty of the county judge to dismiss the writ and remand the relator to the custody of the agent and warden of the prison, unless it could be shown that the Court of Oyer and Terminer was without jurisdiction to pass the sentence, which it did. *People ex rel v. Warden, etc.*, 100 N. Y. 20; *People ex rel. v. Liscomb*, 60 id. 559.

It is not denied that the court had such jurisdiction providing that the Legislature had power under the Constitution to enact chapter 489 of the laws of 1888, entitled "An act to amend sections 491, 492, 503, 504, 505, 506, 507, 508, 509 of the Code of Criminal Procedure, in relation to the infliction of the death penalty, and to provide means for the infliction of such penalty." Prior to the passage of this statute the punishment by death in every case was to be inflicted by hanging the convict by the neck until he was dead. This provision of law was changed by the amendments of the code above referred to, and now the section (505) reads as follows:

The punishment by death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

The only question involved in this appeal is whether this enactment is in conflict with the provision of the State Constitution which forbids the infliction of cruel and unusual punishment. (Const., art. 1, sec. 5.) This provision was borrowed from the English statute passed in the first year of the reign of William and Mary, being chapter 2 of the statutes of that year, entitled "An act declaring the rights and liberties of the subject, and settling the succession of the crown," usually known as the Bill of Rights. It enacts, among other things, that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." When this statute was made part of the Constitution of the United States, the word "shall" was substituted for the word "ought." and

in this form it first appears in the Constitution of this State adopted in 1846. It is not very clear whether the provision as it stands in our Constitution was intended as an admonition to the Legislature and the judiciary, or as a restraint upon legislation inflicting punishment for criminal offences. When the statute referred to was enacted in England it was not intended as a check upon the power of parliament to prescribe such punishment for crime as it considered proper. Its enactment did not change any law then existing, nor did it mitigate the harshness of criminal punishments in that country, as is shown by the fact that for more than half a century after it appeared on the statute book, a long catalogue of offences were punishable by death, many of which were not visited with that extreme penalty before the Bill of Rights was passed. 2 Blackstone's Comm., chap. 33, p. 440.

The history of the times in which this provision assumed the form of a law, shows that it was, after all, intended to be little more than a declaration of the rights of the subject. The English people were about to place upon the throne made vacant by revolution, a foreign prince, whose life had been spent in military pursuits, rather than in the study of constitutional principles and the limitations of power, as then understood in the country he was to govern. This was considered a favorable opportunity to enact, in the solemn form of a statute, a declaration of the principles upon which the people desired the government to be conducted; but whatever the purpose of the statute was in the country where it originated, we think that its presence in the Constitution of this State confers power upon the courts to declare void legislative acts prescribing punishments for crime, in fact cruel and unusual. This is the power that is invoked against the amendments to the Code of Criminal Procedure above referred to by the learned counsel for the relator, in an argument addressed to us, interesting on account of its great political and scientific research. We entertain no doubt in regard to the power of the Legislature to change the manner of inflicting the

penalty of death. The general power of the Legislature over crimes, and its power to define and punish the crime of murder, is not and cannot be disputed. The amendments prescribed no new punishment for the offence. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with what might be considered in this age some degree of cruelty, and it is resorted to only because it is deemed necessary for the protection of society. The act on its face does not provide for any other or additional punishment.

In behalf of the relator, this legislation is assailed in no other way than by attempting to show that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of torture and unnecessary pain. This argument would apply with equal force to any untried method of execution, and, when carried to its logical results, would prohibit the enforcement of the death penalty at all. Every act of the Legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 666, 668; *People, ex rel. v. Briggs*, 50 id. 553, 558; *People v. Home Ins. Co.*, 92 id. 328, 344; *People, ex rel. v. Albertson*, 55 id. 50, 54; *People v. Gillson*, 109 id. 389, 397; *People v. King*, 110 id. 418.

If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the Legislature, some provision of the Constitution may possibly be violated. *People v. Albertson, supra*; *People v. Draper*, 15 N. Y. 532; *Matter of N. Y. E. R. R. Co.*, 70 id. 327.

If the act upon its face is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it. The history and origin of the enactment we are now

considering may very properly be referred to to test its validity, and ascertain its true intent and proper interpretation. It has been said that courts will place themselves in the situation of the Legislature, and by ascertaining the necessity and probable objects of the passage of a law, give effect to it, if possible, according to the intention of the law makers, when that can be done without violating any constitutional provision. *People v. Supervisors*, 43 N. Y. 130. Chapter 352 of the laws of 1886, entitled "An act to authorize the appointment of a commission to investigate and report to the Legislature the most humane and approved method of carrying into effect the sentence of death in capital cases," provided for the appointment of a commission consisting of three eminent citizens, who were named therein, and required them to investigate and report to the Legislature on or before the fourth Tuesday of January, 1887, the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases. To enable this commission to make its investigation most thorough, the Legislature extended the time for it to report for a year longer by chapter 7 of the laws of 1887. This commission early in the legislative session of 1888 made its report, accompanied with a proposed bill which the Legislature afterward and during the same session enacted, and this is the statute which is now attacked in behalf of the relator as an unauthorized expression of the legislative will. The Legislature proceeded to change the mode of executing the sentence of death with care and caution and unusual deliberation. It would be a strange result indeed if it could now be held that its efforts to devise a more humane method of carrying out the sentence of death in capital cases, have culminated in the enactment of a law in conflict with the provisions of the Constitution prohibiting cruel and unusual punishments. Whether the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was a question for the determination of the Legislature. It was a question peculiarly

within its province, and the means at its command for ascertaining whether such a mode of producing death involved cruelty, within the meaning of the constitutional prohibition, were certainly as satisfactory and reliable as any that are consistent with the limited functions of an appellate court. The determination of the Legislature of this question is conclusive upon this court. The amendment to the Code of Criminal Procedure changing the mode of inflicting the death penalty, does not, upon its face, nor in its general purpose and intent, violate any provision of the Constitution. The testimony taken by the referee, while not available to impeach the validity of the legislation, may, we think, be regarded as a valuable collection of facts and opinions touching the use of electricity as a means of producing death and for that reason as part of the argument for the relator, but nothing more. We have examined this testimony, and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions, and in the manner contemplated by the statute, must result in instantaneous and consequently in painless death.

The order appealed from should be affirmed.

All concur.

Order affirmed.

NOTE.—In *People v. Kemmler*, (119 N. Y. 580) decided by the same court and at the same time as the foregoing, the case being upon appeal from the judgment of conviction, Mr. Justice GRAY, writing the opinion of the court, says: "A last point is made on this record, and that is, that the sentence imposed is illegal and unconstitutional, as being a cruel and unusual punishment. As that is the subject of review upon another record, and will be discussed by another member of this court, I shall not stop to consider it here. I may add, however, that I think the point untenable. Punishment by death, in a general sense, is cruel; but as it is authorized and justified by a law, adopted by the people as a means to the end of the better security of society, it is not cruel within the sense and

In re Kemmler.

meaning of the Constitution. The infliction of the death penalty through a new agency is, of course, unusual; but as death is intended as the immediate sequence of the mechanical operation prescribed, it is not unusual in the sense that some certainly prolonged or torturous procedure would be understood to be. In my judgment, we should assume that the enactment of the Legislature was based upon some investigation of facts, and where the declared purpose and end of the law are the infliction of death upon the offender, we may not say, upon a ground work of impossibilities and guess work, that it is, in any sense, an unconstitutional act, because a new mode is adopted to bring about the death."

The history of the New York electrocution law, and of this celebrated Kemmler case, in its progress through the courts, is quite fully presented in the following opinion of the Supreme Court of the United States, to which final resort was made in behalf of the prisoner.

IN RE KEMMLER, Petitioner.

United States Supreme Court, May 23, 1890.

(136 U. S. 436.)

ELECTROCUTION.—CONSTITUTIONAL LAW.

The eighth amendment to the Federal Constitution, which prohibits the infliction of cruel and unusual punishments, does not apply to the States, but only to the national government.

The fourteenth amendment, which forbids any State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is not infringed by the New York statute which provides that capital punishment shall be inflicted by electricity.

Said statute is limited to punishment for crimes committed after its taking effect, and therefore is not repugnant to the provision of the Federal Constitution which prohibits the passage of *ex post facto* laws.

On petition for an original writ of *habeas corpus*. The facts and history of the case are set forth in the opinion.

Roger M. Sherman, for petitioner.

Charles F. Tabor, attorney-general of the State of New York, opposing.

Chief Justice FULLER delivered the opinion of the court: This is an application for a writ of error to bring up for review a judgment of the Supreme Court of the State of New York, affirming an order of the county judge of Cayuga county, remanding the relator to the custody of the warden of the State prison at Auburn, upon a hearing upon *habeas corpus*. The judgment of the Supreme Court was entered upon a judgment of the Court of Appeals of the State of New York, affirming a previous order of the Supreme Court. The application was originally presented to Mr. Justice BLATCHFORD, and, upon his suggestion, was permitted to be made in open court, and has been heard upon full argument.

A writ of error to the highest court of a State is not allowed as of right, and ought not to be sent out when the court in session, after hearing, is of opinion that it is apparent upon the face of the record that the issue of the writ could only result in the affirmance of the judgment. *Spies v. Illinois*, 123 U. S. 131.

The writ of *habeas corpus* was allowed on the 11th day of June, 1889, and made returnable before the county judge of Cayuga county. The petition was filed by one Hatch, and stated "that William Kemmler, otherwise called John Hort, is imprisoned, or restrained in his liberty, at Auburn State Prison, in the city of Auburn, county of Cayuga, State of New York, by Charles F. Durston, agent and warden of Auburn State Prison, having charge thereof. That he has not been committed and is not detained by virtue of any judgment, decree, final order or process issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in the special proceedings instituted for any cause except to punish him for contempt; or by virtue of an exe-

cution or other process issued upon such a judgment, decree or final order. That the cause or pretence of the imprisonment or restraint of said William Kemmler, otherwise called John Hort, according to the best knowledge and belief of your petitioner, is that he was indicted by a grand jury of Erie county for murder in the first degree; that he was tried therefor at a Court of Oyer and Terminer of Erie county, and found guilty thereof by the verdict of a jury on the 10th day of May, 1889; that thereafter and on the 14th day of May, 1889, he was arraigned in said Court of Oyer and Terminer for sentence; that, contrary to the Constitution of the State of New York and of the United States, and contrary to his objection and exception, duly and timely taken in due form of law, he was sentenced to undergo a cruel and unusual punishment, as appears by a copy of the pretended judgment, warrant or mandate hereto annexed, and made a part of this petition, and marked Exhibit 'A,' by virtue of which such imprisonment or restraint is claimed to be made; that he is deprived of liberty and threatened with deprivation of life without due process of law, contrary to the Constitutions of the State of New York and of the United States, and contrary to his objection and exception thereto, duly and timely taken. The imprisonment is stated to be illegal because it is contrary to the provisions of each of said Constitutions."

The warden of the Auburn State Prison made the following return:

"*First.* That I am the duly appointed and acting warden and agent of the Auburn State Prison, and on the said 11th day of June, 1889, and before the said writ of *habeas corpus* was served upon and came to me, the said William Kemmler, otherwise called John Hort, was and now is in my custody and detained by me in the State Prison at Auburn, in the State of New York, under and by virtue of a judgment of the Court of Oyer and Terminer of the State of New York, held in and for the county of Erie, on the 14th day of May, 1889, duly convicting the said William Kemmler, otherwise called John Hort, of

murder in the first degree. A true copy of the judgment roll of the aforesaid conviction is hereto attached as a part hereof, and marked Exhibit 'A.'

"And said William Kemmler, otherwise called John Hort, is also detained in my custody as such warden and agent under and by virtue of a warrant signed by the Hon. Henry A. Childs, the justice of the Supreme Court before whom the said William Kemmler, otherwise called John Hort, was, as aforesaid, duly tried and convicted, and which said warrant was duly issued in pursuance of the aforesaid conviction, and in compliance with the provisions of the Code of Criminal Procedure relating thereto, a copy of which said warrant is hereto annexed as a part hereof, and marked Exhibit 'B.'

"*Second.* And I, the said Charles F. Durston, agent and warden of Auburn State Prison, do make and further return and allege as I am advised and verily believe to be true, that the said William Kemmler, otherwise called John Hort, was not sentenced as hereinbefore set forth to undergo a cruel and unusual punishment, contrary to the provisions of the Constitution of the State of New York and the Constitution of the United States.

"And I do further allege that the said imprisonment and restraint of the said William Kemmler, otherwise called John Hort, and the deprivation of his liberty and the threatened deprivation of life, are not without due process of law and are not contrary to the provisions of the Constitution of the State of New York or the Constitution of the United States, as alleged in the petition upon which said writ of *habeas corpus* was granted.

"I do further allege, as I am advised, that the said judgment of conviction hereinbefore set forth, and the aforesaid warrant and the punishment and deprivation of liberty and the threatened deprivation of life of the said William Kemmler, otherwise called John Hort, thereunder, are fully warranted by the provisions of chapter 489 of the Laws of 1888, which is a valid enactment of the Legislature of the State of New York, and it is not in conflict with or in

violation of the provisions of the Constitution of the State of New York or the Constitution of the United States.

"And I hold the said William Kemmler, otherwise called John Hort, under and by virtue of no other authority than as hereinbefore set forth."

Copies of the indictment of Kemmler, otherwise called Hort, for the murder of Matilda Zeigler, otherwise called Matilda Hort; the judgment and sentence of the court; and the warrant to the warden to execute the sentence, were attached to the petition and return. The conclusion of the warrant, pursuing the sentence, was in these words: "Now, therefore, you are hereby ordered, commanded and required to execute the said sentence upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn State Prison, or within the yard or enclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead."

Upon the return of the writ before the county judge, counsel for the petitioner offered to prove that the infliction of death by the application of electricity as directed "is a cruel and unusual punishment, within the meaning of the Constitution, and that it cannot, therefore, be lawfully inflicted, and to establish the facts upon which the court can pass, as to the character of the penalty. The attorney-general objected to the taking of testimony as to the constitutionality of this law, on the ground that the court has no authority to take such proof. The objection was thereupon overruled, and the attorney-general excepted." A voluminous mass of evidence was then taken as to the effect of electricity as an agent of death. And upon that evidence it was argued that the punishment in that form was cruel

and unusual within the inhibition of the Constitution of the United States and of the State of New York, therefore the act in question was unconstitutional.

The county judge observed that the "Constitution of the United States and that of the State of New York" provide almost identical, provide against cruel and unusual punishment, but it may be remarked, in passing, that the former we have no present concern, as the provision therein contained has no reference to punishment in State courts for crimes against the State, but is solely to the national government and operates as a limitation on its power." He held that the presumption of constitutionality had not been overcome by the evidence, because he had not "made it appear by proofs to the contrary, wise, beyond doubt, that the statute of 1888 in relation to the infliction of the death penalty provides a punishment as unusual, and therefore unconstitutional punishment, that a force of electricity to kill any human subject with celerity and certainty, when scientifically applied, can be generated." He, therefore, made an order denying the writ of *habeas corpus*, and remanding the respondent to the custody of the respondent. From this order an appeal was taken to the Supreme Court, which affirmed the judgment of the county judge. The Supreme Court in its opinion (*People, &c. v. Durston, Warden, &c.*, 55 N. Y. 211) held that it was not competent to support the contention of the relator by proofs *aliunde* the statute; that there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that upon a mere question of fact involved in legislative judgment of a court is superior to that of the Legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the constitution or the matter of legislation, the decision of the Legislature could be reviewed by the court; and that the presumption that the Legislature had ascertained the facts necessary to determine that death by the mode prescribed was not cruel punishment, was conclusive upon the court.

DWIGHT, J., delivering the opinion, also said : "We have read with much interest the evidence returned to the county judge, and we agree with him that the burden of the proof is not successfully borne by the relator. On the contrary, we think that the evidence is clearly in favor of the conclusion that it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless death."

From this judgment of the Supreme Court an appeal was prosecuted to the Court of Appeals, and the order appealed from was affirmed. It was said for the court by O'BRIEN, J.: "The only question involved in this appeal is whether this enactment is in conflict with the provision of the State Constitution which forbids the infliction of cruel and unusual punishment. * * * If it cannot be made to appear that a law is in conflict with the Constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the Legislature some provision of the Constitution may possibly be violated." The determination of the Legislature that the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was held conclusive. The opinion concludes as follows :

"We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless death." At the same term of the Court of Appeals the appeal of the relator

from the judgment on the indictment against heard, and that judgment affirmed. Among others made upon that appeal was this, that the sentence was illegal and unconstitutional, as being a unusual punishment, but the court decided, as in of the appeal from the order under consideration the position was untenable, and that the act was unconstitutional because of the new mode adopted to bring death.

We find, then, the law held constitutional by of Oyer and Terminer in rendering the original judgment by the Supreme Court and the Court of Appeals affirming it; by the county judge in the proceedings writ of *habeas corpus*; by the Supreme Court in the order of the county judge and by the Appeals in affirming that judgment of the Supreme Court.

It appears that the first step which led to the amendment of the law was a statement contained in the message of the governor of the State of New York submitted to the Legislature, January 6, 1885, as "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may be questioned whether the science of the present day can provide a means for taking the life of such as are demned to die in a less barbarous manner. I submit this suggestion to the consideration of the Legislature. The Legislature accordingly appointed a commission to investigate and report "the most humane and efficient method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity, and accompanied their report by a bill which was enacted and became chapter 489 of the laws of 1888. Laws of New York, 1888, 778. Among other changes, section 505 of the Code of Criminal Procedure of New York was amended as to read as follows: "Section 505. The punishment of death must, in every case, be inflicted by causing death."

through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead." Various other amendments were made, not necessary to be considered here.

Sections 10, 11 and 12 of the act are as follows:

"Sec. 10. Nothing contained in any provision of this act applies to a crime committed at any time before the day when this act takes effect. Such crime must be punished according to the provisions of law existing when it is committed, in the same manner as if this act had not been passed; and the provisions of law for the infliction of the penalty of death upon convicted criminals, in existence on the day prior to the passage of this act, are continued in existence, and applicable to all crimes punishable by death, which have been or may be committed before the time when this act takes effect. A crime punishable by death committed after the beginning of the day when this act takes effect, must be punished according to the provisions of this act, and not otherwise.

"Sec. 11. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

"Sec. 12. This act shall take effect on the first day of January, one thousand eight hundred and eighty-nine, and shall apply to all convictions for crimes punishable by death, committed on or after that date."

Kemmler was indicted for and convicted of a murder committed on the 29th day of March, 1889, and therefore came within the statute. The inhibition of the Federal Constitution upon the passage of *ex post facto* laws has no application.

Section 5 of article 1 of the Constitution of the State of New York provides that "excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." The eighth amendment to the Federal Constitution reads thus: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted." By the fourteenth amendment it is provided that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is not contended, as it could not be, that the eighth amendment was intended to apply to the States, but it is urged that the provision of the fourteenth amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition on the State from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term "due process of law."

The provision in reference to cruel and unusual punishments was taken from the well-known act of parliament of 1688, entitled "An act declaring the rights and liberties of the subject, and settling the succession of the crown," in which, after rehearsing various grounds of grievance, and among others, that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishments inflicted," it is declared that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."* Stat. 1 W. & M., c. 2. This Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the Constitution of the State of New York was intended particularly

* *NOTE by the court.*—In the "Body of the Liberties of the Massachusetts Colony in New England," of 1641, this language is used: "For bodilie punishments we allow amongst us none that are inhumane, barbarous or cruel." Colonial Laws of Massachusetts (1889), p. 43.

to operate upon the Legislature of the State, to whose control the punishment of crime was almost wholly confided. So that if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the eighth amendment, in its application to Congress.

In *Wilkerson v. Utah*, 99 U. S. 130, 135, Mr. Justice CLIFFORD, in delivering the opinion of the court, referring to Blackstone, said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision, which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.

The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the Legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the Legislature was possessed of the facts upon which it took action; and that by evidence taken *aliunde* the statute that the presumption could not be overthrown. They went further, and expressed the opinion that upon the evidence the Legislature had attained by the act the object had in view in its passage.

The decision of the State courts sustaining the validity of the act under the State Constitution is not re-examinable here, nor was that decision against any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution of the United States.

Treating it as involving an adjudication that the statute was not repugnant to the Federal Constitution, that conclusion was so plainly right that we should not be justified in allowing the writ upon the ground that error might have supervened therein.

The fourteenth amendment did not radically change the whole theory of the relations of the State and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of the State. Protection to life, liberty and property rests primarily with the States, and the amendment furnishes an additional guaranty against any encroachments by the States upon those fundamental rights which belong to citizenship, and which the State governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges of citizens of the States are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States v. Cruikshank*, 92 U. S. 542; *Slaughterhouse Cases*, 16 Wall. 36.

In *Hurtado v. California*, 110 U. S. 516, 534, it is pointed out by Mr. Justice MATTHEWS, speaking for the court, that the words "due process of law," as used in the fifth amendment, cannot be regarded as superfluous, and held to include the matters specifically enumerated in that article, and that when the same phrase was employed in the fourteenth amendment, it was used in the same sense, and with no greater extent.

As due process of law in the fifth amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within

the limits therein prescribed, and interpreted according to the principles of the common law, so, in the fourteenth amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offences. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. *Barbier v. Connolly*, 113 U. S. 27, 31.

The enactment of this statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence; and the Legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.

In order to reverse the judgment of the highest court of the State of New York, we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States. We have no hesitation in saying that this we can not do upon the record before us.

The application for a writ of error is

Denied.

GENERAL NOTE.

Memoranda of cases not selected for reprinting in full, as previously mentioned in notes.

ABUTTING OWNERS.

Stoucers v. Postal Tel. Cable Co. Mississippi Supreme Court, 1

The erection and maintenance of a telegraph line in a p imposes a new burden upon adjacent land, and the municipal cannot authorize the erection of the line without first providing compensation to abutting owners.

Cases of this series cited in opinion : *Board of Trade Tel. Co.* vol. 1, p. 565 ; *Dusenbury v. Mutual Tel. Co.*, vol. 1, p. 448 ; *Al Teleph. & Tel. Co. v. Colwell Lead Co.*, vol. 1, p. 662 ; *Tiff Illuminating Co.*, vol. 1, p. 629 ; *Broome v. N. Y. & N. J. Tele* 2, p. 259 ; *Hewett v. W. U. Tel. Co.*, vol. 2, p. 223 ; *Pierce v. J.* p. 571 ; *Julia Bdg. Assn. v. Bell Teleph. Co.*, vol. 1, p. 801.

ACKNOWLEDGMENT BY TELEPHONE.

Banning v. Banning. California Supreme Court, Sep. 2, 1889.

If the certificate of acknowledgment of a deed is in due form be impeached by evidence that the acknowledgment was taken by notary by telephone, at a distance of two miles.

CONDEMNATION.

Louisville, N. O. & Texas Ry. Co. v. Postal Tel. Cable Co. Supreme Court, April, 1891. 68 Miss. 806.

Under a statute permitting the condemnation of a right of telegraph company, in case it shall not agree for the same with of the land ; *held*, that after making efforts to get the right and receiving no reply to its proposition within a reasonable time graph company was in position to institute condemnation proceedings.

CONTRACT OF TELEGRAPH COMPANY WITH RAILROAD COMPANY.

Latrobe v. Western Tel. Co. of Baltimore City et al. Maryland Appeals, April 30, 1891. 74 Md. 233.

A contract of a telegraph company with a railroad company that the former might erect and maintain its line upon the right of way ; that in case of dissolution or suspension of operation of graph company, the railroad company might assume control until operation should be renewed by the telegraph company ; its interest under the contract should not be assignable by the company.

Held, that this contract did not enure to the benefit of a new corporation, with new powers and responsibilities, which succeeded the former telegraph company; but that thereupon the telegraph line became the property of the railroad company.

Also, that the rights of the railroad company under the contract could not be taken away by legislative enactment.

ELECTRIC LIGHT.—VALIDITY OF ORDINANCE.

Hanson v. William A. Hunter Electric Light Company et al. Iowa Supreme Court, June 1, 1891. 48 N. W. Rep. 1005.

Under Iowa Code, sec. 471, empowering municipal corporations to authorize the erection of electric light plants upon approval by popular vote, an ordinance granting a franchise to occupy streets with poles and wires for distribution of electric light and power, *held* valid.

A provision of such ordinance authorizing the conducting of water from an artesian well at the intersection of two streets, *held*, incidental to the supplying of electricity, and therefore that the ordinance was not obnoxious to the law forbidding the passage of an ordinance containing more than one subject.

ELECTRIC RAILWAY, INJURY TO PROPERTY OF.

Williams v. Citizens' Railway Co. Indiana Supreme Court, Dec. 15, 1891. 29 N. E. Rep. 408.

Action by an electric railway company for an injunction to prevent the threatened cutting of its poles and wires by the defendant for the purpose of moving a building.

Held, that the fact that the city council had exclusive jurisdiction over the streets did not oust the courts of jurisdiction to grant relief when the council failed to prevent the injury.

EVIDENCE.—CONVERSATION BY TELEPHONE.

J. Obermann Brewing Co. v. William D. Adams et al. Appellate Court of Illinois, April 21, 1890. 35 Ill. App. 540.

Evidence of a conversation by telephone between plaintiff and some one at defendant's place of business, *held*, not admissible against defendant in the absence of proof as to who was talking to plaintiff.

EVIDENCE, USE OF TELEGRAMS AS.

Thorpe v. Philbin. Superior Court of New York City, Feb. 4, 1889. 15 Daly, 155.

A telegram having been admittedly received by defendant from plaintiff, containing information previously requested by letter; and the same information having been a few days afterwards conveyed to defendant by letter from plaintiff; *held*, that a copy of the telegram was admissible in evidence without production of the original.

J. K. Armsby Co. v. Ackertly. St. Louis Court of Appeals, Nov. 25, 1890. 42 Mo. App. 299.

If an original telegram, partly in cipher, be introduced by the sender,

and at that time contain interlineations in pencil explaining the cipher, but the copy transcribed and delivered do not show this, it cannot be presumed that the interlineations were in the original, at a particular time during the trial.

INJURY TO PROPERTY BY TELEPHONE COMPANY.

Erie Tel. & Teleph. Co. v. Kennedy. Texas Supreme Court, March 8, 1891. 80 Tex. 71.

In erecting a telephone pole in a place designated by the mayor and city engineer, a hole was cut in an awning belonging to the plaintiff.

Held, that the telephone company was liable in damages for the actual injury caused to plaintiff, but not for exemplary damages.

CUTTING TREES.—DAMAGES.

Jesse P. Hoyt et al. v. The Southern New England Telephone Company. Supreme Court of Errors of Connecticut, April 20, 1891. 60 Conn. 385.

Action for damages for cutting ornamental shade trees in a street. It was proven that the adjacent lot was valuable for building purposes, and was for sale, and that the tree added \$150.00 to its value.

Held, that \$150.00 was properly allowed as the actual loss caused by the destruction of the tree. Also, that the action being for injury to land, the mere value of the tree as wood or timber would not be the proper measure of damages.

DANGEROUS WIRES.—CONTRIBUTORY NEGLIGENCE.

Brush Electric Lighting Company v. Kelly. Indiana Supreme Court, Nov. 26, 1890. 25 N. E. Rep. 812.

The failure of a traveler, in the day time, to notice an electric light wire on the sidewalk, over which she fell, *held*, not contributory negligence as matter of law.

INTERSTATE COMMERCE.

In Re Pennsylvania Tel. Co., New Jersey Court of Chancery. Nov. 24, 1890. 20 Atl. Rep. 846.

The sending of messages by telephone from one State to another is interstate commerce, and cannot be prohibited or regulated by injunction in either State against persons or corporations engaged in sending such messages, on account of non-payment of taxes assessed by such State.

TAXATION OF ELECTRIC LIGHT COMPANIES.

Commonwealth v. Northern Electric Light & Power Co. 145 Pa. St. 105.

Commonwealth v. Edison Electric Light Co., id. 181.

Commonwealth v. Brush Electric Light Co., id. 147.

All decided by the Pennsylvania Supreme Court, October 5, 1891.

Each holds that an electric light and power company is not a manufacturing corporation so as to exempt it from taxation under the statute of 1885

The two cases last named also hold that the stock of an electric light company issued to the owners of patents in consideration of the exclusive use of their patented appliances within the company's territory, is not invested in "patent rights" so as to exempt it from taxation under the statute of 1885.

TAXATION OF TELEPHONE COMPANY.

Commonwealth v. Cent. Dist. & Printing Tel. Co. Pennsylvania Supreme Court, Oct. 5. 1891. 23 Atl. Rep. 121.

Stock of a local telephone company, issued to the foreign parent company which owns its instruments, pursuant to the contract between the two companies for the leasing of the instruments, is not invested in "patent rights" so as to exempt the local company from taxation on such stock.

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Barrett v. W. U. Tel. Co. (Miss.).....

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Mental distress, as an element of damages, in telegraph cases. (See "*Damages.*")

Proper element, to enhance damages growing out of breach of contract for prompt delivery in action by sender.
Western Union Tel. Co. v. Henderson (Ala.).....

Or in action by addressee, if sender were his agent and closed such agency to operator.
Western Union Tel. Co. v. Wilson (Ala.).....

Mental distress will not warrant recovery in the absence of proof of contractual relations or other injuries.

Chase v. W. U. Tel. Co. (U. S.).....
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To warrant the consideration of mental suffering as an element of damages, there must be such gross negligence on the part of the agents of the company as to indicate wanton or malicious purpose.

Crawson v. W. U. Tel. Co. (U. S.).....

Substantial damages allowed to addressee of telegraph for mental distress alone.

Chapman v. W. U. Tel. Co. (Ky.).....
Thompson v. W. U. Tel. Co. (N. C.).....
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Reese v. W. U. Tel. Co. (Ind.).....
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More continued anxiety caused by failure of a telegraph company to deliver a message announcing the improvement of a sick relative will not support a claim for damages.

Rowell v. W. U. Tel. Co. (Tex.).....

Mississippi telegraph statute.

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Ogden City Ry. Co. v. Ogden City (Utah)..... 831

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Electric Railway Co. of Grand Rapids v. Common Council (Mich.)..... 67

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Farrell v. Winchester Ave. R. R. Co. (Conn.)..... 85

The erection and maintenance of electric light poles for street lighting is within the licensing power of a municipal corporation endowed by the Legislature with the control of its streets.

Johnson v. Thomson-Houston Elec. Co. (N. Y.)..... 202

An ordinance which merely permits an electric light pany to use the streets of a municipal corporation, with granting any exclusive privilege, is valid.

Crowder v. Town of Sullivan (Ind.).....

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Electric Imp. Co. v. San Francisco (U. S.).....

Under certain statutes, held that board of aldermen discretionary power, even to extent of withholding designation whatever for electric light fixtures.

Suburban Light & Power Co. v. Board, &c. (Mass

In a case of concurrent power in Probate Court and municipal authorities to permit and regulate use of street electrical companies, held that certain ordinances apply to certain poles and that others were governed by a decision of the court.

Haus Elec. Lighting Co. v. Jones Bros. Elec. (Ohio).....

Fact that municipality has exclusive control of streets not oust courts of power to enjoin destruction of wires poles.

Williams v. Citizens' Ry. Co. (Ind.).....

Navigable stream. (See "*Post-roads act.*")

Nebraska telegraph statute.

Providing that telegraph companies shall not be exempt from liability by reason of any "cause, condition, or agreement contained in its printed blanks," is reasonable binding.

Kemp v. W. U. Tel. Co. (Neb.).....

Avoids stipulation limiting liability as to unrepented sages.

Western Union Tel. Co. v. Lowrey (Neb.).....

Negligence. (See "*Burden of Proof,*" "*Duty to Customers*" "*Limiting Liability,*" "*Injuries from Electrical Appliances*" and other special topics.)



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New York subways acts. (See NOTES, pp. 120, 131, 141, 167.)

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Act of Legislature authorizing and ratifying contract for construction of subways was within its power.

American Rapid Tel. Co. v. Hess (N. Y.)..... 142

Refusal of board of electrical control to permit certain electric light companies to make repairs, no excuse for failure to make them until they had exhausted their legal remedy.

United States Illum. Co. v. Grant (N. Y.)..... 95

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East River Elec. Lt. Co. v. Grant (N. Y.)..... 127

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Brush Elec. Illum. Co. v. Consol. Tel. &c. Co. (N. Y.)..... 150

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So far as the contemplated erection and maintenance of electric railway appliances may constitute a public nuisance, an individual cannot have it restrained by injunction without showing some injury peculiar to himself.
The single wire overhead trolley system held to be not *per se* dangerous to life or property.

Louisville Bagging Mfg. Co. v. Cent. Pass. Ry. Co. (Ky.)..... 336

Electric railway poles, though a nuisance, if erected by proper authority, cannot be abated by a court, in absence of fraud or corruption.

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The commissioner of public works of a city, either by virtue of his office, or as a private citizen, has a right summarily to remove a public nuisance existing in the street, dangerous to the lives of citizens, *e. g.*, uninsulated electric light wires, without first going to the creator of the nuisance and informing him of the discovery of its existence and requesting him to abate the same, and thereafter waiting, before proceeding to protect the lives of the citizens, for some indefinite length of time, called a reasonable time, in order to see whether the creator of the nuisance will not abate it.

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The rule that he who suffers a nuisance to be maintained upon his premises, and derives benefit from it, cannot recover for injury due to its maintenance, applied in a case where electric wires hindered firemen from saving a building.

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Allegation in complaint that horses not long accustomed to electric motor cars are wont to become frightened thereat, and that thus the streets through which such railway passes become unpopular for travel, thereby lessening value of property of abutting owner, does not raise legal conclusion of additional burden upon street, and is demurrable.	
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Taggart v. Newport St. Ry. Co. (R. I.)	336
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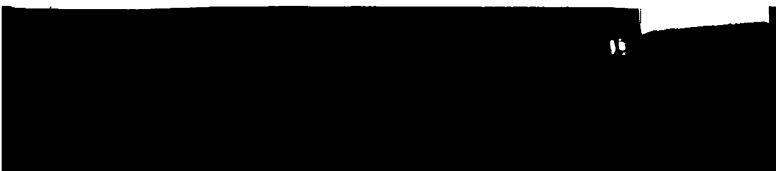
**In absence of satisfactory evidence of known co
business to receive for transmission messages v
delivered to operators, telegraph company will
held liable for failure to deliver such message.**

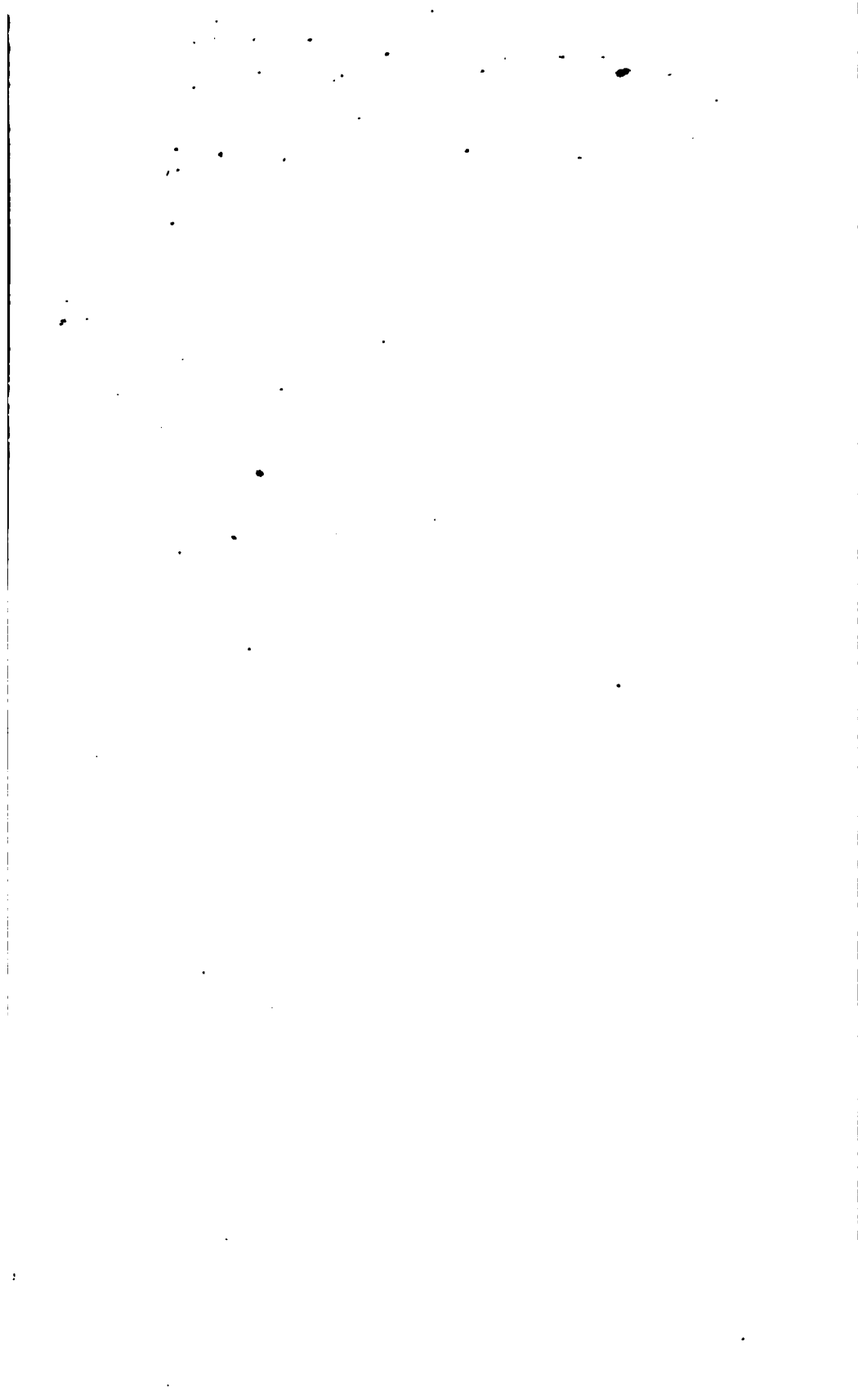
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